

# Alaska Native Voting Rights



A Report of the  
Alaska Advisory Committee to the  
U.S. Commission on Civil Rights

June 2019

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

**Alaska Advisory Committee to the  
U.S. Commission on Civil Rights**

The Alaska Advisory Committee to the U.S. Commission on Civil Rights (Committee) submits this report regarding the effectiveness of the implementation of the *Toyukak v. Mallott* settlement and court order related to language access, and the potential disparate impact of a statewide vote by mail system on Alaska Native voters. The Committee submits this report, a more extensive analysis than the [advisory memorandum](#) submitted to the U.S. Commission on Civil Rights in March of 2018, as part of its responsibility to study and report on civil rights issues in the state of Alaska. The contents of this report are based on testimony the Committee heard during a public briefing on August 24, 2017 in Anchorage, Alaska; and two web hearings on June 19, 2018 and August 1, 2018.

This report documents an evaluation of the state's effort in 2016 to implement the *Toyukak v. Mallott* settlement and court order related to language access for Alaska Native voters, and examines concerns regarding the potential impact of vote by mail—a move that the State was considering during the gathering of evidence and before the production of this report. The State has since decided it will not implement a vote by mail system at this time. This could change at any time, so the information contained in this report is still relevant and being presented in its entirety. Based on the findings of this report, the Committee offers to the U.S. Commission on Civil Rights recommendations for addressing the issue of voting rights for Alaska Natives and communities requiring language assistance. The Committee recognizes that the Commission has previously issued important studies about voting and civil rights nationwide and hopes that the information presented here continues the efforts of the Commission in protecting voting rights across the nation.

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## I. EXECUTIVE SUMMARY

When Congress extended the Voting Rights Act in 1975 to include the language assistance provisions in Section 203, they recognized that certain minority citizens experienced historical discrimination and disenfranchisement due to limited English proficiency. As a result, Congress mandated that political subdivisions provide English-language voting also in minority languages. Congress also mandated that covered political subdivisions provide written materials, oral assistance at polling sites, and publicity prior to Election Day about the availability of language assistance at polling sites. In Alaska, there are 14 census areas that are covered jurisdictions, and each must provide language assistance in at least one Alaska Native language.

In the last three decades, Alaska has undergone and lost two significant court cases regarding compliance with Section 203, despite having a legal obligation to provide language access to limited English proficient voters since the 1975 extension of the VRA. Of concern to the Alaska Advisory Committee is *Toyukak v. Mallott*, only the second Section 203 case fully tried and the first one since the Reagan Administration, and the quality of the State's 2016 implementation of the 2014 federal court ruling. Secondly, when the State considered implementing a vote by mail election system,<sup>1</sup> the Committee sought to determine its potential impact on Alaska Native voters and rural voters alike. However, as the Committee was in the process of drafting this report, the State announced it would not move forward with implementing a vote by mail system at this time, in response to results from studies and feedback from focus groups. Moreover, the State alleges any fundamental voting methods or systems would have to be determined by the Alaska Legislature. Thus, while the issue may be on hold for now, the Committee believes the findings related to the potential impact of vote by mail are very useful and instructive because this issue can resurface at any time.

The following report is divided into three sections and results from the testimony provided during three public meetings<sup>2</sup> and testimony submitted to the Committee in writing during the thirty-day open period for public comment. The first section provides background information about the Voting Rights Act and its minority language requirement; a discussion about Alaska Native demography and physical landscape; a brief history of Alaska Native voting rights; information on *Toyukak v. Mallott*, the voting rights case concerning minority language access and focus of this report; and information concerning the State's initial plan to implement a vote by mail election system. The second section is a summary of themes derived from testimony. Finally, it concludes with findings identified by the Committee and recommendations in response to findings directed to federal and state entities.

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<sup>1</sup> The Division of Elections report it will not move forward with implementing a vote by mail system; see Appendix F for Josie Bahnke, former director of the Division of Elections, Letter to the Election Policy Work Group.

<sup>2</sup> On August 24, 2017, the Committee convened a public briefing in Anchorage, Alaska to hear testimony from election officials, Alaska Native voters, vote by mail experts, and other stakeholders regarding the implementation of the *Toyukak v. Mallott* settlement and court order and the potential impact of a vote by mail election system. To examine the potential impact of implementing a vote by mail election system on Alaska Native voters, the Committee held two web briefings on June 19, 2018 and August 1, 2018, to receive updates on relevant research.

The findings in this report are divided into two sections: findings regarding the implementation of the Toyukak Order and findings concerning the potential impact of implementing a vote by mail system.

### **Findings regarding the implementation of the Toyukak Order:**

1. While the Toyukak Order requires language assistance and election materials in Yup'ik and Gwich'in in the Dillingham, Kusilvak, and Yukon-Koyukuk Census Areas, the State is also obligated to comply with Section 203 covered languages in other regions within the state.
2. Federal observers present during the 2016 Primary and General Elections documented the following training deficiencies under Section 203 and the Toyukak Order:
  - a. Although training for poll workers is supposed to be mandatory, and is supposed to emphasize in-person training, it fell short of that goal. In 2016, 46 percent (55 poll workers) received training, 4 percent (5 poll workers) received training at least a year earlier, 10 percent (12 poll workers) received training two or more years earlier, and 39 percent (47 poll workers) had never been trained.
  - b. Trainings were conducted exclusively in English by a non-Native instructor from the Division of Elections.
  - c. Bilingual poll workers were not trained on how to translate contents of the ballot or how to provide procedural instructions in Yup'ik and Gwich'in.
3. The Division of Elections is required to conduct pre-election outreach through arranging informational meetings community wide, in small groups, or one-on-one meetings to register voters and provide election information such as what will be on the ballot. While the Division of Elections claimed to have met these requirements, they were unable to adequately report/log the frequency and effectiveness of mandatory pre-election outreach.
4. Inadequate staffing of bilingual poll workers in the three Census Areas suggests that some limited English proficient voters may have not received bilingual assistance and translations necessary to cast their ballot on Election Day. For example, federal observers found that some villages had no bilingual poll worker available, bilingual poll workers were only available on call or available for a limited time, poll workers left the polling location with no assistance available during their absence, or poll workers left early before the polls closed and did not return.
5. The Division of Elections fell short of complying with translation requirements. The Division of Elections reported that they were able to complete all translation requirements for election materials in Gwich'in, but not all materials in Yup'ik dialects.
6. Translated written materials required under the Toyukak Order were unavailable in numerous locations. Federal observers monitoring the 2016 Primary and General Elections identified the following deficiencies:

- a. During the 2016 Primary Election, no translated voting materials were available in 6 of the 19 villages; the “I voted” sticker was the only material in an Alaska Native language in Marshall and Mountain Village; in Emmonak, the Yup’ik glossary was the only translated material available; and only two villages, Koliganek and Manokotak, had written translations of the candidate lists.
  - b. During the 2016 General Election, half of polling places observed had a translated sample ballot available for voters. Five of those villages had no sample ballot at all or if a translated ballot did exist, it was not made available for voter use.
7. In comparison with New Mexico, a state with a high number of limited English proficient voters requiring American Indian language accommodations, it employs eight full-time language coordinators, whereas Alaska has just two full-time bilingual workers to carry out the implementation of the Toyukak Order. Alaska also relies on Yup’ik and Gwich’in language panels and part-time outreach workers. While the Toyukak Order requires hiring one permanent elections language compliance manager to implement it, there is concern that current language access efforts may be insufficient to accomplish meaningful implementation.
8. The Division of Elections has no procedures in place to assess the effectiveness of poll worker training or outreach worker training.
9. While the Division of Elections reported to the Committee that it had implemented most of the remedies in the Toyukak Order and even expanded the language panels to include the Inupiat panel, testimony indicates that the Division of Elections still falls short on quality and usefulness of translations. For example, some voters indicated they had difficulty reading the Yup’ik ballot due to small font size.
10. There is a statutory inconsistency regarding the rights of voters to receive the OEP in that one statute requires that it is sent to each household and another statute states that it should be sent to each voter. A Koliganek voter official reported that she never received an OEP in advance of the general election and state elections but according to Alaska Statute 15.58.010, the Division of Elections must mail “at least one election pamphlet to each *household* identified from the official registration list.” However, Alaska Statute 15.58.080 requires that the Division of Elections must mail to every registered *voter* one copy of the pamphlet prepared for the region in which the voter resides at least 22 days before the general election.
11. There is an unequal distribution of election equipment among urban and rural polling stations. Some panelists expressed concern that equipment lacked privacy and was inadequate to serve rural voters.
12. Although the *Nick, et al. v. Bethel, et al* case alleged the State of Alaska had been out of compliance with the VRA since the language assistance provisions were passed in 1975, testimony by Alaska Federation of Natives and individuals indicated that Governor Walker’s Administration was making efforts to comply.



**Findings concerning the potential impact of implementing a vote by mail system:**

1. Voters expressed grave concern over the State's interest in implementing a vote by mail system due to slow mail delivery that often takes up to 2-3 weeks. Mail delivery relies on air service but, according to testimony, villages may be inaccessible by air for several weeks due to inclement weather, and at times flights may be cancelled even in good weather conditions. To compound the issue further, the Regional Educational Attendance Areas elections and statewide general elections are held in October and November, when weather conditions are usually the most challenging, and delays in mail service are likely to disenfranchise rural voters.
2. There has been no study examining the impact of vote by mail on Alaska Natives, limited English proficient voters, geographically and linguistically isolated communities, and voters who receive mail exclusively by P.O. Box.
3. However, there is a related study focused on the impact of vote by mail on Native American voters in Washington, a state that administers elections exclusively by mail and voter turnout. Research indicated there is no evidence that vote by mail had any significant effect on increasing voting turnout among Native Americans. In a related study commissioned by the State's Election Policy Work Group, rural voters who were dissatisfied or very dissatisfied with their mail service preferred to keep voting the way it is now when asked about their assessment of their mail service and preferred method to vote.
4. A recent study conducted on reservations in Arizona, New Mexico, Nevada and South Dakota indicated that native voters have a low level of trust in a vote by mail system. For example, 39 percent of Nevada residents in Duck Valley, Yerington, Pyramid Lake, and Walker River reservations trusted that their vote would count as intended.
5. At a recent hearing in North Dakota, a tribal member who is also a current member of the Montana House of Representatives testified that offering only a vote by mail system disenfranchises voters in native communities because they have irregular mail and inconsistent or nontraditional addresses.
6. Some rural Alaska Native villages have unreliable internet service or may even lack access to broadband internet that may be necessary to meaningfully participate in the election process. Internet access would allow voters to access the Division of Election's website to download election forms and the OEP. According to testimony, an Alaska Native elder walked two miles from her home to the nearest public library that had internet access to download the necessary election forms to participate in early voting.
7. Testimony indicated the following concerns with implementing a vote by mail system:
  - a. There are challenges with employing and retaining postmasters residing in rural parts of the state. This poses a concern as voters rely heavily on postmasters to keep post offices open to receive mail and obtain mail services.

- b. Since rural residents often share P.O. boxes, sometimes multiple families sharing one P.O. box, voters may not be receiving all election-related material. This is critical to ensuring privacy and enfranchisement.
    - c. Researchers argue that a vote by mail system causes five issues:
      - i. distance to post offices or mailboxes is an impediment to casting ballots;
      - ii. it does nothing to counter the lack of trust in the veracity of government institutions, especially among Native American communities;
      - iii. it fails to tangibly link citizens to the democratic process;
      - iv. it has little impact in broadly increasing participation among Native American voters;
      - v. and there are no systems in place to address lost ballots.
8. Nearly half of rural voters from the Bethel, Dillingham, and Kusilvak Census Areas prefer to keep the current voting method the same and the second preference is to receive their ballot in the mail and have different ways to return it.
9. The settlement agreement mandates that language assistance be provided prior to and during the voting process. It was not clear, if language assistance could or would be provided prior to and during the possible implementation of a vote by mail system.
10. At the time of the August 24, 2017 public briefing in Anchorage, the Division of Elections testified that adopting a hybrid model that consists of a vote by mail and in person voting system was seen more favorably rather than implementing a vote by mail system exclusively. However, they have since indicated that due to the challenges that geography would pose for mail service, implementing an all vote by mail system is not an option for Alaska. Testimony indicated that the application of a hybrid model may only work if the Division of Elections established a voting center in each of the over 200 Alaska Native villages and required that each of them be open for the same period as other early voting locations.
11. Panelists noted that when considering a vote by mail system, the State is still required to abide by the terms of the Toyukak Order. Those terms require significant in-person assistance and therefore vote by mail can only potentially work if there was a “voting center” in each village covered by Section 203 of the VRA.
12. According to a vote by mail expert, developing a remedy process and signature verification system is a necessary component when considering a vote by mail system.
13. Panelists suggested strong and ongoing collaboration among the Alaska Native communities, rural communities, state election officials, and the U.S. Postal Service to deter voter disenfranchisement especially among Alaska Native voters in need of language assistance.

14. According to the U.S. Postal Service, when inclement weather impacts delivery to rural areas, passengers and luggage are the priority, not mail. This means that election-related mail is considered secondary in importance.
15. Because the U.S. Postal Service transfers mail from villages to the Anchorage central hub, where it is postmarked, rural residents who vote in a village may not have their ballots counted due to the possibility of late postmarking.
16. Testimony indicated that U.S. Postal Service training on handling election-related material is inadequate due to the high number of U.S. Postal Service employees who need to be trained.
17. Presently, state election officials have not yet determined how to directly distribute ballots and the translated OEPs to Section 203-covered households due to limited data sources that indicate languages spoken at home. Efforts to circulate the OEP were done through respective regional tribes, local governments, online, the Alaska Federation of Natives' conference, and other advocacy organizations prior to the 2016 presidential election and will continue to be circulated in this fashion.
18. Testimony indicated the following potential impacts of implementing a vote by mail system:
  - a. It may have the potential for improving voter registration rolls.
  - b. It has increased voter turnout in state and local elections among certain populations in other states. However, factors such as socioeconomic status, demographics, educational attainment and the issues on the ballot are primary determinants of voter turnout.
  - c. It creates the potential for logistical and administrative problems and even increased potential for malfeasance.
19. A study conducted asking English-speaking rural voters, most of whom are Alaska Native, how they prefer to receive their ballots. Roughly 60 percent replied they prefer to receive it in person on Election Day, 21 percent prefer to receive it by mail, and 17 percent prefer to receive it online.

In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Alaska Advisory Committee submits the following recommendations to the Commission:

The U.S. Commission on Civil Rights should send this report and issue a formal request to the U.S. Department of Justice to:

- Vigorously enforce Section 203 of the Voting Rights Act in Alaska.
- Continue to send federal observers to monitor state elections even after the Toyukak Order expires, to ensure its implementation remains in place.

The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the U.S. Postal Service to:

- Require specific training of all Alaska postal service employees to handle election material to ensure prompt delivery.
- Ensure prompt postmarking of election mail, especially in rural areas of the state. This may include proactive recruitment of postmasters in rural post offices to ensure adequate support to rural residents.
- Prioritize handling election mail as among other mail.

The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Alaska Congressional Delegation to:

- Provide appropriations from the Help America Vote Act to support language assistance efforts in Alaska.

The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the State of Alaska Legislature urging the State to:

- Provide appropriations to ensure the Division of Elections has the funding to continue complying with Section 203 of the Voting Rights Act, the Toyukak Order, and Title VI of the Civil Rights Act.
- Provide subsidies to deliver broadband service in rural areas of the state, to ensure that voters have access to all online election material, including translated official election pamphlets provided by the Division of Elections.
- Enact legislation resembling Title VI of the Civil Rights Act to help ensure statewide access to voting materials for voters with limited English proficiency.

The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the Alaska Governor, Lieutenant Governor, and the State of Alaska Division of Elections:

- Conduct analyses on the vote by mail system and its potential impact on the following communities: (i) Alaska Natives, (ii) rural residents, (iii) linguistically isolated and limited English proficient residents, and (vi) the illiterate voting age population.
- Pause plans to move forward with a vote by mail system in any census area covered by the *Toyukak v. Mallott* settlement agreement, unless the Division of Elections can ensure that all terms of the Toyukak Order will be fully complied with.
- Comply with the entire Toyukak Order.

- Implement a hybrid voting system that includes: a strong early voting option; in-person voting both in early/absentee voting and on Election Day; and a vote by mail system to avoid voter disenfranchisement.
- Continue to convene community speaker-based language panels to strengthen language access efforts and consider identifying additional panel members from the University of Alaska Fairbanks, Alaska Native Language Center, if available.
- Consider implementing recommendations and best practices from the President's Commission on Election Administration regarding access to the polls and polling place management.
- Review Title VI language access requirements to ensure compliance.
- Evaluate the effectiveness of poll worker and outreach worker training to identify areas for improvement.
- Based upon testimony heard regarding the substantial undertaking to implement a state-wide language assistance program and the testimony indicating that problems and challenges remain, the State should extend the Toyukak Order past 2020.
- Given the lack of broadband access in most parts of rural Alaska, require alternative methods for receiving election materials such as sending election material directly to voting centers and inform voters by broadcasting informational commercials on radio and television.
- Continue convening the Election Policy Work Group to analyze the impact of mail in voting.

## II. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On June 13, 2017, the Alaska Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to take up a proposal examining Alaska Native voting rights. Specifically, the Committee sought to evaluate the State's implementation efforts regarding language assistance to its Alaska Native population after a 2014 federal court ruling. Secondly, when the State considered implementing a vote by mail election system in 2017, the Committee sought to determine its potential impact on Alaska Native voters and rural voters alike. However, after drafting this report, the State announced it would not move forward with implementing a vote by mail system at this time. This could change at any time, so the information contained in this report is still relevant and being presented in its entirety.

On August 24, 2017, the Committee convened a public briefing in Anchorage, Alaska to hear testimony regarding the implementation of the *Toyukak v. Mallott* settlement and court order that directly affects Alaska Native voters and to examine the potential impact of a vote by mail election system. The following report is an extension of an advisory memorandum submitted to the U.S. Commission on Civil Rights on March 27, 2018. Contents within this report results from the testimony provided during the public briefing, testimony submitted to the Committee in writing during the thirty-day open period of public comment, and testimony provided during two web briefings on June 19, 2018 and August 1, 2018. To view a timeline of events relevant to the Committee's inquiry, see Appendix A.

This report and the recommendations included within were adopted by the majority of the Committee on June 10, 2019.

## IV. BACKGROUND

Voter restrictions have historically been used as a political tool, creating hurdles for voters based on party affiliation and racial and ethnic background, thereby preventing already marginalized populations from participating in the franchise. During the Reconstruction, states attempted to circumnavigate the law by enacting grandfather clauses, or clauses that appeared to treat all voters equally but allowed an exemption to the literacy tests for voters whose fathers or grandfathers were previously able to vote before 1867, or before the Fourteenth and Fifteenth Amendments.<sup>3</sup> By creating this loophole, state laws benefited potential white voters and disenfranchised minority voters whose grandfathers were likely to have been unable to vote previously. The Supreme Court subsequently held that grandfather clauses were unconstitutional and in violation of the Fifteenth Amendment.<sup>4</sup>

Nonetheless, some states continued to require voters to have the ability to read and write in English. In *Lassiter v. Northampton County Board of Education*, the Supreme Court upheld a North Carolina law that required potential voters to read and write any section of the state constitution in English.<sup>5</sup> The law had the purported purpose of raising the standard of voters and protecting the integrity of the election system, despite its devastating impact on the voting abilities of communities of color.<sup>6</sup> The Court decided that the law was permissible because it applied to members of all races and was for the purpose of raising the standard of voters.<sup>7</sup> The use of constitutional interpretation or understanding tests were also enacted under the pretext of being “citizenship” tests that were uniform and objective. For example, in *Louisiana v. United States*, registrars were given wide discretion and able to deny voter registration applications if the applicant was unable to “give a reasonable interpretation” of clauses in the Louisiana or United States Constitution.<sup>8</sup> The requirement only applied to new applicants, and white voters had their applications approved while discriminatory practices were still in effect, being given far less rigorous terms than African American voters.<sup>9</sup> The Court held that the requirement was unconstitutional and contrary to the Fifteenth Amendment.<sup>10</sup> The implied requirement that voters be able to read and write in English has chilled the rights of many individuals, who would have otherwise been able to participate in the democratic process.

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<sup>3</sup> See e.g., *Guinn v. United States*, 238 U.S. 347, 358-60 (1915) (discussing the Oklahoma legislature’s decision to enact a grandfather clause exemption from literacy tests after allowing men of all races to vote, following the Fifteenth Amendment).

<sup>4</sup> *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>5</sup> *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Louisiana v. United States*, 380 U.S. 145, 148 (1965).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## A. The United States Voting Rights Act

President Lyndon B. Johnson signed into law the Voting Rights Act<sup>11</sup> on August 6, 1965, (the “VRA”) in response to Jim Crow laws and other restrictions of African Americans’ voting rights primarily in the Deep South. The Voting Rights Act was passed as a means of protection against targeted disenfranchisement.<sup>12</sup> Leading up to its passage, civil rights activists had been working for years to obtain voting rights for all Americans but had only achieved minimal success.<sup>13</sup> It was not until March 7, 1965 that the Johnson Administration supported voting rights legislation. The call was in response to an event now known as Bloody Sunday, in which state troopers descended on peaceful protestors who were en route to the state capital in Montgomery in an unprovoked attack on Edmund Pettus Bridge in Selma, Alabama.<sup>14</sup>

This landmark federal legislation codified the Fifteenth Amendment’s guarantee that no person shall be denied the right to vote because of their race or color.<sup>15</sup> The VRA included key provisions for voter access, including banning the use of literacy tests<sup>16</sup> and giving courts the power to send federal examiners and observers to monitor elections in proceedings instituted by the U.S. Attorney General.<sup>17</sup> Up until 2013, Section 5 of the VRA also froze new election practices or procedures in certain states until the new procedures had been reviewed by the Attorney General of the United States, or before the United States District Court for the District of Columbia.<sup>18</sup> During the review, the procedures were examined for discriminatory purpose or effect, prior to the potentially negative impact on minority voting rights. However, in *Shelby County v. Holder*, the Court determined that the formula determining which jurisdictions were held to the preclearance requirement, Section 4(b) of the VRA, was unconstitutional.<sup>19</sup> Without the coverage formula, Section 5 was rendered inoperative until and unless Congress enacts a law establishing a new coverage formula.<sup>20</sup> The majority distinguished *Shelby* from the Court’s earlier opinion in *South Carolina v. Katzenbach*—which established the constitutionality of the VRA<sup>21</sup>—by reasoning that the preclearance formula had been enacted at a time when states had voter requirements that

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<sup>11</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101–10702).

<sup>12</sup> U.S. Dep’t of Justice, *History of Federal Voting Rights Laws*, <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last accessed July 23, 2019).

<sup>13</sup> *Ibid.*

<sup>14</sup> Klein, Christopher. “Remembering Selma’s ‘Bloody Sunday,’” History.com, March 6, 2015, <https://www.history.com/news/selmas-bloody-sunday-50-years-ago> (last accessed July 23, 2019).

<sup>15</sup> U.S. Dep’t of Justice, “Introduction to Federal Voting Rights Laws,” <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-1> (last accessed July 23, 2019).

<sup>16</sup> 52 U.S.C. §§ 10301, 10303.

<sup>17</sup> 52 U.S.C. §§ 10302–10303, 10305.

<sup>18</sup> *See Shelby County v. Holder*, 570 U.S. 529, 534–37 (2013).

<sup>19</sup> *Id.* at 556–57.

<sup>20</sup> American Bar.org, “ABA panel examines the effect of *Shelby County v. Holder*,” Sept. 17, 2014, [https://www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba\\_panel\\_examines/](https://www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba_panel_examines/) (last accessed July 23, 2019).

<sup>21</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).



prevented African Americans from voting, and that unlike the *Katzenbach* decision in 1966, the formula, designating Shelby County as a covered jurisdiction, was no longer relevant.<sup>22</sup>

The 1965 VRA was amended in 1975, extending the Act to include protections against voter discrimination toward “language minority citizens,” and bringing more jurisdictions under its preclearance requirements.<sup>23</sup> In 1982, the VRA was again amended to allow violations of the VRA’s nondiscrimination section to be established without having to prove discriminatory purpose.<sup>24</sup> That is to say, under Section 2 of the VRA, if the voting requirements of a particular jurisdiction have a discriminatory impact, a VRA violation can be found regardless of intent.

### ***I. Section 203 of the United States Voting Rights Act***

The 1975 amendment to the VRA included the provision Section 203, which protects certain minority groups who have experienced historical discrimination and disenfranchisement due to limited English-speaking abilities.<sup>25</sup> Congress singled out Latinos, Asian Americans, American Indians, and Alaska Natives for protection under Section 203, finding that:

[T]hrough the use of various practices and procedures, citizens of [the four covered groups] have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.<sup>26</sup>

Section 203 of the VRA requires geographically targeted jurisdictions or covered state or political subdivisions, to make voting materials and information, including ballots, available in minority languages in addition to English.<sup>27</sup> The simple goal of these accessibility efforts is to ensure that all voters have an “effective opportunity to register, learn the details of the elections, and cast a free and effective ballot.”<sup>28</sup>

Congress developed a triggering formula to determine whether a specific jurisdiction is “covered” under the statute and therefore required to provide language assistance to certain minority language

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<sup>22</sup> *Shelby*, 570 U.S. at 530-531.

<sup>23</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400.

<sup>24</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

<sup>25</sup> 52 U.S.C. § 10503(a) (previously codified as 42 U.S.C. § 1973b(f)(1)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> U.S. Dep’t of Justice, “About Language Minority Voting Rights,” (Mar. 27, 2019), <https://www.justice.gov/crt/about-language-minority-voting-rights#coveredjuris>.

speaking voters.<sup>29</sup> There are two criteria under Section 203's coverage formula which must be satisfied for the provision to apply in a given state or jurisdiction. First, the Americans of voting age in a single protected language group needing minority language materials must: (1) number more than 10,000; (2) comprise more than five percent of all citizens of voting age; or (3) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation.<sup>30</sup> Second, the illiteracy rate of the citizens of the minority language group must exceed the national illiteracy rate.<sup>31</sup> Section 203 applies only to Spanish, Asian languages, and Native American and Alaska Native languages, and is governed by a coverage formula that is updated every five years.<sup>32</sup> The statute also specifically addresses Alaska Natives and American Indians, providing "[t]hat where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting."<sup>33</sup> Alaska is a covered jurisdiction because protected language groups comprise more than five percent of all citizens of voting age and comprise more than five percent of all Alaska Natives of a single language group residing on Indian reservations.<sup>34</sup>

In order to keep up with demographic changes, the U.S. Census Bureau maintains a list of jurisdictions subject to Section 203 coverage based upon the most recent five years of the American Community Survey census data.<sup>35</sup> In December of 2016, the Director of the U.S. Census Bureau released an updated list of jurisdictions that are required to provide language assistance under Section 203, replacing the last list, made in October of 2011.<sup>36</sup> The new determination found a total national population of over 21 million voting-age citizens that require minority language assistance, residing in 263 covered jurisdictions.<sup>37</sup> This is an increase of 13.2 percent, compared to the roughly 19 million and 248 jurisdictions in 2011.<sup>38</sup> The 2016 Census determination

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<sup>29</sup> Ibid.

<sup>30</sup> 52 U.S.C. § 10503(b)(2)(A).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see also U.S. Census Bureau, *Section 203 Language Determinations; Decennial Census of Population and Housing*, <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html>; Voting Rights Act Amendments of 2006, Determinations under Section 203, 81 Fed. Reg. 87532 (Dec. 5, 2016) <https://www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28969.pdf> [hereinafter cited as 2016 Section 203 Determinations].

<sup>33</sup> 52 U.S.C. § 10503(c).

<sup>34</sup> 52 U.S.C. § 10503(b)(2)(A)(i)(III); see U.S. Census Bureau, *Section 203 Determinations Table* (Dec. 5, 2016), <https://www.census.gov/data/tables/2016/dec/rdo/section-203-determinations.html>.

<sup>35</sup> 52 U.S.C. § 10503(b)(2)(A).

<sup>36</sup> 2016 Section 203 Determinations, *supra* note 34.

<sup>37</sup> Cohn, D'Vera. "More Voters Will Have Access to Non-English Ballots in the Next Election Cycle." Pew Research Center. <https://www.pewresearch.org/fact-tank/2016/12/16/more-voters-will-have-access-to-non-english-ballots-in-the-next-election-cycle/> (accessed August 2, 2019).

<sup>38</sup> Ibid.

illustrates that there are significant concentrations of citizens who primarily speak various Asian, Native American, and Alaska Native languages.<sup>39</sup> In Alaska, the covered languages include Yup'ik, Aleut, Inupiat, Alaska Athabascan, Filipino, and Hispanic in the respective Census Areas:<sup>40</sup>

<b>Jurisdiction</b>	<b>Language</b>
Aleutians East Borough	Filipino
Aleutians East Borough	Hispanic
Aleutians East Borough	Yup'ik
Aleutians West Census Area	Aleut
Aleutians West Census Area	Filipino
Bethel Census Area	Inupiat
Bethel Census Area	Yup'ik
Bristol Bay Borough	Yup'ik
Dillingham Census Area	Yup'ik
Kenai Peninsula Borough	Yup'ik
Kodiak Island Borough	Yup'ik
Lake and Peninsula Borough	Yup'ik
Nome Census Area	Inupiat
Nome Census Area	Yup'ik
North Slope Borough	Inupiat
Northwest Arctic Borough	Inupiat
Southeast Fairbanks Census Area	Alaskan Athabascan
Valdez-Cordova Census Area	Alaskan Athabascan
Wade Hampton Census Area	Inupiat
Wade Hampton Census Area	Yup'ik
Yukon-Koyukuk Census Area	Alaskan Athabascan
Yukon-Koyukuk Census Area	Inupiat

The Department of Justice has been successful in enforcing the provision since its enactment, demonstrating Section 203's impact across the nation. Specifically, between 1992 and 2006, the Department of Justice brought twenty-six successful cases in twelve of the states covered in whole or in part by Section 203 and participated as an intervening party or submitted amicus briefs in many others.<sup>41</sup>

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<sup>39</sup> 2016 Section 203 Determinations, 81 Fed. Reg. 87532. These languages include: Athabascan, Bangladeshi, Chinese, Choctaw, Filipino, Hindi, Hopi, Inupiat, Japanese, Khmer, Kickapoo, Korean, Navajo, Pueblo, Tohono 'O'Odham, Vietnamese, Yaqui, Yuma, or Yup'ik.

<sup>40</sup> *Id.*

<sup>41</sup> James Thomas Tucker, *The Ballot of Bilingual Ballots Shifts to the Courts: A Post-Boerne Assessment of 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 576–77 (Summer 2008); *see also, e.g., Nick v. Bethel, Alaska*, No. 3:07-

## *I. Alaska Native Demography and Landscape*

To understand Alaska Native voter participation in Alaska, an explanation of the demography and physical landscape deserves attention. Alaska is unique in that it has the largest percentage of Native voters in any state with roughly 17.7 percent of Alaska's citizen voting-age population.<sup>42</sup> In addition, Alaska Natives are more geographically isolated than American Indians in the lower forty-eight states.<sup>43</sup> Geographically, many Alaska Native villages are inaccessible by road and are only accessible by boat or air and may be unreachable due to unpredictable weather (see Figure 1).<sup>44</sup>

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cv-00098 TMB, 2010 WL 1145611134 (D. Alaska July 30, 2008) (A federal court issued a preliminary injunction and specific relief after finding that the Bethel Census Area of Alaska had not complied with its obligations under Section 203 of the VRA since 1975).

<sup>42</sup> See U.S. Census Bureau, *2006–2010 American Community Survey American Indian and Alaska Native Tables*, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_AIAN\\_B05003&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_AIAN_B05003&prodType=table).

<sup>43</sup> James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, *Why Should I Go Vote Without Understanding What I Am Going to Vote For? The Impact of First Generation Voting Barriers on Alaska Natives*, 22 Mich. J. Race & L. 327 (2017), <http://repository.law.umich.edu/mjrl/vol22/iss2/5>.

<sup>44</sup> Natalie Landreth & Moira Smith, *Voting Rights in Alaska 1982-2006*, RenewtheVRA.org, 3 (2006), <http://www.protectcivilrights.org/pdf/voting/AlaskaVRA.pdf> (noting that Alaska has nearly 200 native villages and communities that are inaccessible by road).





## II. *Brief History of Alaska Native Voting Rights*

Alaska has a long history of problems ensuring the rights of Alaska Natives to vote. In 1915, Alaska passed an “Act to define and establish the political status of certain Native Indians within the Territory of Alaska,” which imposed a burdensome and discriminatory pre-registration process on Natives seeking citizenship.<sup>45</sup> The pre-registration process imposed seven requirements, one of which being that applicants obtain endorsements from five white citizens and “sever[] all tribal relationships and adopted the habits of a civilized life.”<sup>46</sup> This posed the difficult question of choosing between participating in the democracy or retaining one’s identity and cultural ties.

While the law was rendered obsolete nine years later because of the passage of the Indian Citizenship Act of 1924, the Territorial Legislature responded by enacting a law that required an English literacy test as a prerequisite to voting.<sup>47</sup> This English literacy test is significant because Alaska had an official government policy that established a segregated school system and discouraged building high schools in rural villages. This systemic form of educational discrimination had a profound impact on the illiteracy rate of Alaska Natives, where greater than 50 percent were limited English proficient.<sup>48</sup> In comparison to the 1970 Census, Alaska Natives illiteracy rate was approximately 36 percent.<sup>49</sup> Many Alaska Native students had no local schools in their villages and were forced to travel to great distances or attend boarding school to obtain an education.<sup>50</sup> By the time the VRA was extended in 1975, only roughly 2000 Alaska Native students had completed a high school education.<sup>51</sup> In addition to the difficulty of securing local schools in

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<sup>45</sup> 1915 Alaska Sess. Laws 52.

<sup>46</sup> *Id.*

<sup>47</sup> Stephen Haycox, “William Paul, Sr. and the Alaska Voters’ Literacy Act of 1925,” *Alaska Hist. Soc’y*, Vol. 2 (Winter 1986–1987), p. 17, [http://www.alaskool.org/native\\_ed/articles/literacy\\_act/LiteracyTxt.html](http://www.alaskool.org/native_ed/articles/literacy_act/LiteracyTxt.html).

Article V, section 1 of the Alaska Constitution currently reads: “Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty-day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions.” ALASKA CONST. art. V, § 1. “The original version included a provision requiring that ‘a person otherwise qualified to vote in state or local elections be able to read or speak the English language as a prerequisite for voting.’ This measure was repealed with a vote of 34,079 to 32,578 on August 25, 1970, after H. J. Res. 51, introduced by Rep. Chancy Croft, placed Constitutional Amendment 2 on the 1970 ballot.” Landreth & Smith, *Voting Rights in Alaska 1982-2006*, *supra* note 46 at 14 n. 46.

<sup>48</sup> Landreth & Smith, *Voting Rights in Alaska 1982-2006*, *supra* note 46 at 22.

<sup>49</sup> James T. Tucker, *The Battle Over Bilingual Ballots: Language Minorities and Political Access Under the Voting Rights Act* (New York: Ashgate Pub., Ltd. 2013), p. 256.

<sup>50</sup> Tucker, Landreth, and Lynch, *Why Should I Go Vote*, pp. 330-33.

<sup>51</sup> Landreth and Smith, *Voting Rights in Alaska 1982-2006*, p. 22.

villages, Alaska Natives also faced inequality in obtaining education funding because the State used racially discriminatory procedures to disperse funds.<sup>52</sup>

These discriminatory practices made it difficult for Alaska Native voters to participate in the electoral process for several years.<sup>53</sup> Despite the passage of key laws that sought to remedy discrimination against Alaska Natives, such as the Indian Citizenship Act of 1924, Alaska Equal Rights Act of 1945, and the Voting Rights Act of 1965 and its language minority requirements, Alaska continues to face challenges with providing its residents equitable access to the polls.

In the last three decades, the State of Alaska's Division of Elections, the state entity responsible for administering elections, was sued twice due to its failure to comply with the language assistance provision of the VRA.<sup>54</sup> Before the first lawsuit was filed in 2007, the Division of Elections had done little to provide complete, clear, and accurate translations of all voting materials and information to Alaska Native voters.<sup>55</sup> In 2007, Yup'ik-speaking voters and tribes located in the Bethel Census Area sued the Lieutenant Governor and the Division of Elections.<sup>56</sup> The plaintiffs alleged that state election officials had violated Section 203 (the minority language accommodation requirement), Section 208 (the provision that allows voters with disabilities including voters who have difficulty with English the right to assistance in the voting booth) and Section 5 (the provision requiring certain jurisdictions to receive federal approval before changing voting or election laws) of the VRA by failing to provide translations of all voting information and assistance in Native languages for voter registration, absentee voting, and Election Day activities.<sup>57</sup> After three years, the Court found that the State violated all three provisions and required the Division of Elections to provide a number of remedies through the end of 2012. These remedies, among others, included:

- ensure that poll workers who were fluent in English and Yup'ik are present at each polling location in the Bethel Region;
- train poll workers on the requirements for language and voter assistance;
- hire a language coordinator fluent in Yup'ik to serve as a liaison to the tribal councils and Yup'ik-speaking community to review the State's efforts to provide effective language assistance;
- broadcast and publish any pre-election publicity provided to voters in English to be also offered in Yup'ik; and,
- work with Yup'ik language experts to ensure accurate translations of election materials.<sup>58</sup>

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<sup>52</sup> Tucker, Landreth, and Lynch, *Why Should I Go Vote*, pp. 330-33.

<sup>53</sup> Landreth and Smith, *Voting Rights in Alaska 1982-2006*, pp. 99-101.

<sup>54</sup> *Nick v. Bethel*, 3:07-cv-00098-TMB (D. Alaska Dec. 4, 2008); *Toyukak v. Mallott*, No. 3:13-cv00137-SLG (D. Alaska July 19, 2013).

<sup>55</sup> Tucker, Landreth, and Lynch *Why Should I Go Vote*, pp. 350-54.

<sup>56</sup> *Nick v. Bethel*, 3:07-cv-00098-TMB (D. Alaska Dec. 4, 2008).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

The remedies outlined in the settlement were meant to address the needs of all Yup'ik speaking populations, and all Native language speakers in general. However, that did not happen. Three years later, a second lawsuit, *Toyukak v. Mallott*, raised similar allegations with regard to the Census areas directly above and below the one at issue in the *Nick* case. It is this second case, *Toyukak v. Mallott*, that is the subject of the Alaska Advisory Committee's study regarding the implementation of the settlement and court order.

## **B. *Toyukak v. Mallott***

On July 19, 2013, two Alaska Native citizens, (Mike Toyukak and Fred Augustine) and four Alaska Native tribal governments (Arctic Village, Hooper Bay, Togiak, and Venetie) sued the Lieutenant Governor of the State of Alaska, and the Division of Elections, for failing to provide effective language assistance to limited English proficient Alaska Native voters in three Census Areas that were covered by Section 203 (see Figure 2).<sup>59</sup> The Defendants had been notified that the relevant jurisdictions, by way of census data, had triggered Section 203 coverage in 2011 and were effective upon publication of the determinations in the Federal Register. The complaint specifically alleged that the State failed to provide Yup'ik or Gwich'in language voting materials to Alaska Native U.S. citizens who were voting-age and either registered to vote or eligible to vote in federal and state elections, in violation of Section 203.<sup>60</sup> According to state law, Alaska is required to mail its Official Election Pamphlet<sup>61</sup> to every household with a registered voter at least twenty-two days prior to a state-wide general election or an election with a ballot measure.<sup>62</sup> The complaint alleged that the state did not produce an Official Election Pamphlet and any other pre-election information disseminated to voters in English in any of the covered Alaska Native languages, effectively denying Alaska Native voters the opportunity to a meaningfully participate in the election process.<sup>63</sup>

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<sup>59</sup> Complaint, *Toyukak v. Mallott*, No. 3:13-cv-00137-SLG (D. Alaska September 8, 2015), (Dkt. No. 1).

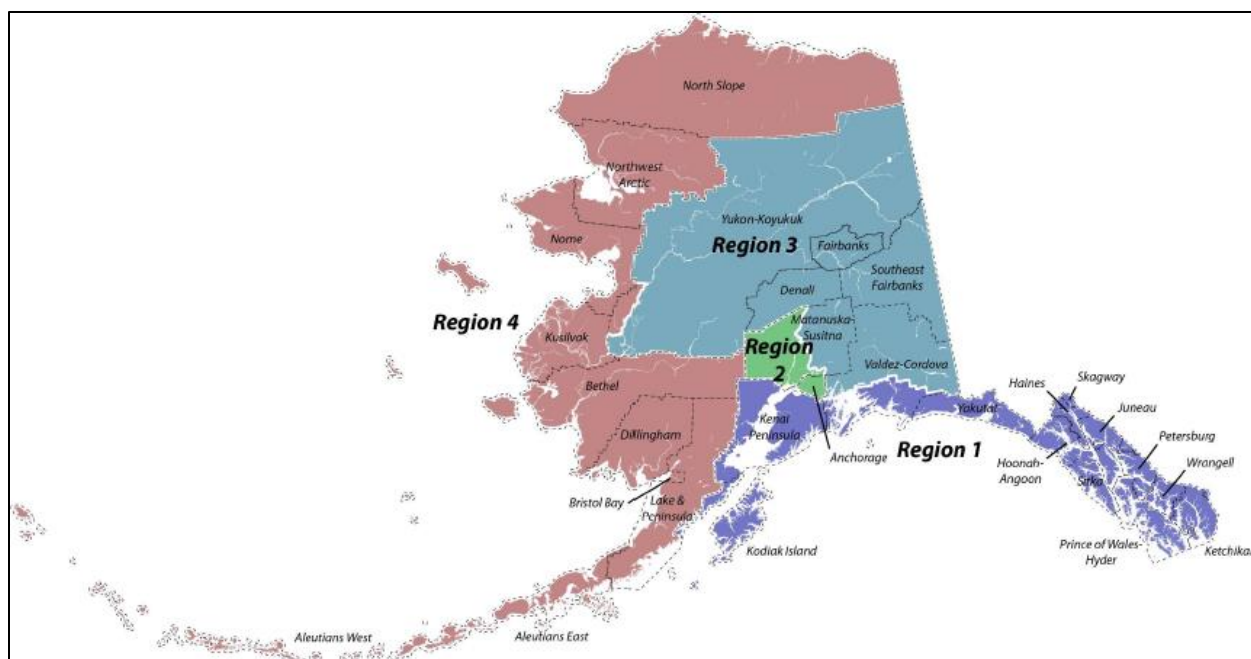
<sup>60</sup> Complaint, *Toyukak*, Case No. 3:13-cv-00137-SLG (Dkt. No. 1). The *Toyukak* plaintiffs originally made constitutional claims under the Fourteenth and Fifteenth Amendments and requested a claim for relief under Section 3(c) of the Voting Rights Act, but they agreed to dismiss those issues under the terms of the Stipulated Judgement and Order.

<sup>61</sup> The Official Election Pamphlet contains over a 100 pages of important election information that includes: candidate statements; Judicial Council recommendations for retention of judicial candidates; sample ballots; thorough information on ballot propositions, materials submitted by political parties; constitutional convention questions; and any other information on voting procedures the lieutenant governor considers important.

<sup>62</sup> Alaska Stat. §§ 15.58.010, 15.58.080.

<sup>63</sup> Complaint, *Toyukak*, Case No. 3:13-cv-00137-SLG (Dkt. No. 1).





*Figure 2. Map of Alaska Census Areas. Alaska is unique in that it is not organized by county, but instead “subdivides the unorganized areas of the state into census areas for the purpose of presenting statistical data.”<sup>64</sup> In *Toyukak v. Mallott*, the settlement areas include Region 3 which is composed of Yukon-Koyukuk Census Area; and Region 4, which is composed of Kusilvak and Dillingham Census Areas.*

On September 3, 2014, the federal court for the District of Alaska found that the State had again violated Section 203 of the VRA by failing to provide election materials in Yup’ik and Gwich’in and ordered the parties to confer to be implemented immediately and report back to the court.<sup>65</sup> Notably, the court did not resolve the Constitutional claim at that time. The parties submitted to the court a host of remedies and then entered into settlement discussions to dispose of the remaining Constitutional claim. After this briefing, on September 22, 2014, the Court ordered interim remedies for the 2014 elections.<sup>66</sup> The Court later directed the parties to engage in settlement discussions and, on September 8, 2015 and the parties reached a settlement agreement that required numerous changes to the administration of elections. This agreement was approved by Judge Gleason on September 30, 2015.<sup>67</sup> Among the changes was a requirement of the State to provide increased language assistance for Yup’ik-speaking voters in the Dillingham and the Kusilvak Census Area (formerly Wade Hampton Census Area) and for Gwich’in-speaking voters

<sup>64</sup> U.S. Census Bureau, Geographic Areas Reference Manual 4-2 (Nov. 1994), <https://www.census.gov/geo/reference/garm.html> (italics in original). Much of Alaska’s land mass is included in the ten designated census areas.

<sup>65</sup> Transcript of Status Conference, *Toyukak*, No. 3:13-cv-137-SLG (D. Alaska September 3, 2014) (Dkt. No. 223).

<sup>66</sup> *Id.* at No. 226.

<sup>67</sup> Joint Motion for Settlement, *Toyukak*, No. 3:13-cv-00137-SLG-LCL, (No. 269); Order approving Stipulated Judgment and Order, *Toyukak*, No. 3:13-cv-00137-SLG-LCL (No. 282).

in the Yukon-Koyukuk Census Area.<sup>68</sup> Pursuant to Section 3(a) of the Voting Rights Act, Election Observers were to be appointed who were authorized to attend and observe elections and election activities in the three areas. The State also agreed to translate the entire Official Election Pamphlet in Gwich'in and Yup'ik. The Court agreed to retain jurisdiction of the action until December 31, 2020, to enter further relief or other orders as necessary to effectuate the terms of the order, and to ensure compliance with Section 203 and the Fourteenth and Fifteenth Amendments. The settlement agreement included the following conditions, among others:<sup>69</sup>

- Increasing pre-election resources, including a summary of available language assistance materials and an explanation to voters that help is available both on and before Election Day;
- A requirement that there be at least one trained bilingual outreach worker and poll worker in each village, whose language abilities have been verified by the Defendants with written confirmation from the tribal council;
- Provide the translations of election materials and language assistance in various Yup'ik and Gwich'in dialects;
- Provide glossaries of election terms in the Yup'ik dialects and Gwich'in to assist outreach workers and poll workers with their translations;
- Provide a toll-free number for voters to identify bilingual workers in the voter's village and when events are scheduled, providing language assistance in all dialects;
- Institute a Yup'ik translation panel comprised of eight members and a Gwich'in translation panel comprised of at least three;
- Implement additional procedures to ensure translations are accurate;
- Require that the State maintain a full-time employee to oversee compliance with Section 203 and to administer the language assistance program;
- Requiring that the Division provide between ten and thirty hours of outreach for each election, depending on whether pamphlets are available;
- Require that there be language assistance in all villages in the Dillingham and Kusilvak Census Areas, and in seven villages in the Yukon-Koyukuk Census Area;
- Mandate training for poll workers and outreach workers, for which the Division maintain records of and handle travel arrangements for workers;
- Mandating pre-election outreach to voters to explain information regarding election administration, deadlines, voter registration, absentee voting, voter identification requirements, what will be on the ballot, the toll-free number assistance, all in the covered language and dialect;
- Governing record-keeping procedures and requirements;
- Providing Election Day publicity translations on all radio stations in the impacted census areas; and

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<sup>68</sup> See *id.* Dialects noting Nunivak Island Cup'ig is also part of the Toyukak Order, albeit under different conditions.

<sup>69</sup> See Appendix B.

- Providing translated sample ballots, voter registration forms, permanent absentee voting procedures, and touchscreen voting machines.

Effective September 30, 2015 the Division of Elections was ordered to implement the settlement terms that are slated to remain in effect in 29 communities through December 2020. While the court has retained primary jurisdiction to oversee the State's compliance with the settlement agreement, this body is similarly concerned with evaluating the quality and progress of the implementation to date.

*Toyukak v. Mallot* is the second Section 203 case fully tried through a decision in 34 years. Attorneys for the plaintiffs noted, “[t]he voters in these cases had been entitled to equality for 40 years, but they had to fight for nearly a decade in two federal court cases to get it.”<sup>70</sup>

### C. Vote by Mail System

Only three states nationwide conduct all elections *exclusively* by mail: Oregon (adopted in 2000), Washington (2011), and Colorado (2013). Largely, in a vote by mail system, a ballot is automatically mailed to every registered voter in advance of Election Day, and traditional in-person voting precincts are not available. While a vote by mail election means that every registered voter receives a ballot by mail, states do not preclude in-person voting opportunities on and/or before Election Day. Other states permit all-mail elections in certain circumstances, such as for special districts, municipal elections, when candidates are unopposed, or at the discretion of the county clerk. In Alaska, the Anchorage Assembly approved a change to their municipal code on March 22, 2016, making Anchorage the only municipality in the state that conducts elections solely by mail.<sup>71</sup>

Jurisdictions elect to conduct vote by mail elections for a variety of reasons such as the perception that it might increase voter turnout, financial savings, and voter convenience and satisfaction. For Alaska, its Division of Elections is suggesting a shift to a vote by mail system in large part due to its current fiscal challenges. This suggestion was largely prompted by a 2017 internal audit of the Division of Elections, state auditors raised concern regarding the aging precinct-based ballot tabulation system nearing its end-of-life that will require eventual replacement and would provide “a good opportunity for the State to consider alternative voting methods for state and federal elections.”<sup>72</sup> Although the Division of Elections had not yet conducted a full cost analysis of

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<sup>70</sup> Tucker, Landreth, and Lynch, *Why Should I Go Vote*, p. 329.

<sup>71</sup> Anchorage, Alaska, AO No. 2018-4 (2018); *see also* Municipality of Anchorage, “Elections: Frequently Asked Questions: How Was the Decision to Change to Vote by Mail Elections Made,” <https://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/Frequentlyaskdquestions.aspx#S7Q1> (last accessed July 24, 2019).

<sup>72</sup> State of Alaska, Division of Elections, *2017 Fiscal & Policy Challenges*, p. 19, <http://www.elections.alaska.gov/doc/info/Fiscal%20Challenges.pdf> (hereafter cited as *Division of Elections 2017 Fiscal & Policy Challenges*).

conducting elections by mail, they acknowledge that it may have cost-savings benefits. In considering this move, the Division of Elections noted “unique considerations of mail service in rural Alaska would need to be carefully considered.”<sup>73</sup>

To advance policy discussions about the future of the State’s election administration, Lieutenant Governor Mallott convened a new body called the Election Policy Work Group, with the aim of replacing Alaska’s voting system by 2020. In 2017, the Election Policy Work Group “[e]xplored a Hybrid/Universal Ballot Delivery method that includes by-mail and in person voting,” noting that “[i]f it doesn’t work for rural Alaska, it won’t work for Alaska.”<sup>74</sup> In 2018, the Group hosted “focus groups” (consisting of approximately eight people of which identified as Alaska Native) in Bethel with a Division of Elections Yup’ik interpreter to facilitate discussion amongst Elders and Tribal leadership on pros, cons, and concerns around current voting methods and the universal ballot delivery system being considered by the Election Policy Work Group.<sup>75</sup> In July of 2018, the Division of Elections engaged in research to assist the Election Policy Work Group in formulating recommendations for future state and federal elections.<sup>76</sup> The Division presented three research reports,<sup>77</sup> with varying methodologies and sample sizes on ballot delivery systems from the perspective of voters in rural Alaska, research from focus groups in Bethel and research from a voting methods survey.

The first report surveyed respondents on their preferences for methods of voting and potential hurdles in participants’ abilities to vote. The study, *Perceptions of Universal Ballot Delivery Systems: Findings from A Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska*,<sup>78</sup> found that after hearing a description of various voting methods (the current system,

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<sup>73</sup> Division of Elections 2017 Fiscal & Policy Challenges, p. 20.

<sup>74</sup> Alaska Division of Elections, Election Policy Work Group, 2017-2018 Timeline, [http://www.elections.alaska.gov/doc/info/180416%20EPWG%202017\\_2018%20Timeline%20%20Accomplishments.pdf](http://www.elections.alaska.gov/doc/info/180416%20EPWG%202017_2018%20Timeline%20%20Accomplishments.pdf)

<sup>75</sup> Ibid.

<sup>76</sup> Josie Bahnke, Director, State of Alaska Division of Elections, letter to the Election Policy Work Group, Jul. 18, 2018, Alaska Online Public Notices. <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=113377> (hereafter cited as DOE Letter to Election Policy Work Group).

<sup>77</sup> Ibid.; see also Appendix C. The three reports are attached to the letter written by Director Josie Bahnke of the State of Alaska Division of Election’s direct to the Election Policy Work Group.

<sup>78</sup> Virgene Hanna & Jessica Passini, *Perceptions of Universal Ballot Delivery Systems: Findings from a Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska*, Institute of Social and Economic Research U. of Alaska, pp. 18-21, (noting the methodology, which included conducting the survey entirely in English), [https://pubs.iseralaska.org/media/d2ea4bda-7817-4e0c-a6a6-ab86ded14a75/2018\\_06-PerceptionsOfUniversalBallotDeliverySystems.pdf](https://pubs.iseralaska.org/media/d2ea4bda-7817-4e0c-a6a6-ab86ded14a75/2018_06-PerceptionsOfUniversalBallotDeliverySystems.pdf). (hereafter cited as *Perceptions of Universal Ballot Delivery Systems*); see also Virgene Hanna, testimony, *Web Hearing Before the Alaska Advisory Committee to the U.S. Commission on Civil Rights*, Aug. 2, 2018, transcript, p. 4, (hereafter cited as *Web Hearing II*), <https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005vUm/QqB1TYFMxBx92u9Ep9g8fmmFWwRIMsxQdwtQ>

mailing out and back, and receiving ballot in the mail with different methods of return), 49 percent of respondents preferred to maintain the status quo.<sup>79</sup> In addition, 46 percent said that the ballot being written in English made it difficult for people in their community to vote.<sup>80</sup> While over half of respondents reported they are satisfied with their mail service, only 17 percent of those who were satisfied said they would prefer to receive or return their ballot by mail.<sup>81</sup>

The second report, *Bethel Focus Groups*,<sup>82</sup> which summarized findings from three focus groups<sup>83</sup> consisting of varying number of participants<sup>84</sup> who gathered in Bethel, aimed to gather insight from residents of rural Alaska on revitalizing Alaska's voting systems.<sup>85</sup> Most of the adult voters preferred changing the voting system to one in which they had the option of voting by mail in advance of the election or going to a polling location on Election Day.<sup>86</sup> The second choice option was maintaining the current system, and the last choice option was voting by mail due to concerns about rural delivery.<sup>87</sup> These focus groups also noted that accessibility to the post office and stamps were also difficult, which is notable because most rural residents pick up their mail from a box at the post office, rather than receive delivery to their home.<sup>88</sup> Additional concerns were centered around privacy and security, as well as relying on relatives for translations if no translators were provided. Some of the concerns raised about the current system, namely transportation to polling places and the poor accessibility of the locations, could be resolved by vote by mail system. In contrast to the adult focus group high school students preferred keeping the current system by a wide margin.<sup>89</sup>

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[OqArAgo](#) (Institute of Social and Economic Research (ISER) responded to Committee questions concerning methodology).

<sup>79</sup> *Perceptions of Universal Ballot Delivery Systems*, pp. 20-21; Hanna Testimony, *Web Hearing II*, pp. 6-7.

<sup>80</sup> *Perceptions of Universal Ballot Delivery Systems*, pp. 5, 27; Hanna Testimony, *Web Hearing II*, pp. 9-13.

<sup>81</sup> *Perceptions of Universal Ballot Delivery Systems*, p. 5.

<sup>82</sup> See DOE Letter to Election Policy Work Group which includes the Bethel Focus Groups report.

<sup>83</sup> The Committee finds that the Division of Election's use of focus groups is not representative of the broader public, especially in the composition of the three focus groups to obtain conclusions regarding voters' preference for voting in elections.

<sup>84</sup> Two focus groups consisted of a total of eight adult participants and one focus group consisted of an unknown number of students.

<sup>85</sup> The Bethel Focus Group report describes methodology in its "Overview" section and does not provide the final count of focus group participants from April 16-17, 2018. This section notes the focus group was conducted in English and handouts provided were in prepared in English and Yup'ik. In addition, two employees from the Division of Elections were available to provide Yup'ik translation as needed.

<sup>86</sup> DOE Letter to Election Policy Work Group, p. 1 (which includes the Bethel Focus Groups report).

<sup>87</sup> *Ibid.*, pp. 1-2.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

The third report, *Voting Methods*,<sup>90</sup> surveyed participants from Division of Elections presentations in Anchorage on their perspectives on various voting methods.<sup>91</sup> This survey was conducted at the Alaska Municipal League and City Clerks' meeting where the majority of respondents were from incorporated communities and organized boroughs, unlike the communities addressed in *Toyukak v. Mallot* and the majority of communities covered by Section 203. More than half of the participants were from a city and worked for the Clerk's Office. Eighty percent of respondents viewed precinct/poll voting and absentee/early voting as very effective, with mixed responses for vote by mail.<sup>92</sup> Notably, 55 percent<sup>93</sup> reported that they did not provide language assistance for limited-English proficient voters nor bilingual worker training.<sup>94</sup>

As of July 2018, the Election Policy Work Group continued to meet to discuss the potential impact of a vote by mail system and its effect on language access until the November 2018 midterm election. In a letter to the Election Policy Work Group, Josie Bahnke, noted:

“In a nutshell, the research informed the group that an exclusive all vote by mail (VBM) system is not an option for Alaska. This is primarily due to unique challenges of rural mail service, N[ational] V[oter] R[egistration] A[ct] requirements to provide language assistance, and a desire for communities to retain the social aspect of going to the polls on Election Day. However, Alaskans support expanding voter options for ballot access to increase voter participation and the concept of a universal (hybrid) ballot delivery system.”<sup>95</sup>

In effect, the Division of Elections will move forward with replacing the aging ballot tabulation equipment and will examine expanding voter choice by developing a legislative strategy but had decided as of the time of this report, not to pursue a vote by mail system. This could change at any time, so the information contained in this report is still relevant and being presented in its entirety.

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<sup>90</sup> See DOE Letter to Election Policy Work Group which includes the Division of Elections: Voting Methods Survey report.

<sup>91</sup> Ibid., p. 1 (noting the Alaska State Division of Elections surveyed participants attending the 2017 Alaska Municipal League (AML) and the Alaska Association of Municipal Clerks (AAMC) conferences held in Anchorage on the week of November 13-17, 2017. “The total number of surveys distributed was 88, 49 of which were returned, constituting a 56 percent response rate. The survey was informal, did not employ a random sample methodology and is therefore not representative of all incorporated places in Alaska. The survey is meant to benchmark responses at the conferences and may be used to supplement other research in order to inform the Division on current perspectives on different voting methods.”).

<sup>92</sup> Ibid., p. 4.

<sup>93</sup> This number represents incorporated communities, the majority of which are on the road system, and/or reside in Regions I or II who were not subject to Section 203 requirements in 2016. As such, the Division of Elections alleges it was not required to provide language assistance. Whether or not this is accurate at this time is beyond the scope of this report.

<sup>94</sup> Ibid., p. 7.

<sup>95</sup> Josie Bahnke, Recap of EPWG email, Thursday, July 26, 2018; see Appendix F.

## V. SUMMARY OF PANEL TESTIMONY

### A. Division of Elections Implementation of *Toyukak v. Mallott* Settlement and Court Order

The State of Alaska Division of Elections presented a written report<sup>96</sup> on the language assistance provided per the *Toyukak v. Mallott* settlement and court order (Toyukak Order) for the 2016 election cycle. Indra Arriaga, the Language Assistance Program Compliance Manager who was hired to carry out certain provisions of the *Toyukak* order, testified to explain major aspects of that report. Specifically, the Toyukak Order related to three Census Areas — Dillingham, Yukon-Koyukuk, and Wade Hampton, which was renamed as Kusilvak — and the following languages: Bristol Bay Yup'ik, General Central Yup'ik, Hooper Bay Yup'ik, Chevak Cup'ik, Norton Sound [Kotlik] Yup'ik, Yukon Yup'ik and Gwich'in.

#### I. Current Progress

##### a) Translation Panels and Language Glossaries<sup>+</sup>

As part of the Toyukak Order, the Division of Elections is required to create translation panels for the Yup'ik and Gwich'in dialects to translate all election materials. These materials include election term glossaries, ballots and sample ballots, public service announcements, official election pamphlets, and other election-related material.

For the identified Yup'ik dialects, the Yup'ik translation panel translated all materials, to varying degrees of completeness, as time and resources allowed.<sup>97</sup> The Division of Elections reported they were able to fully comply in regard to translations of Gwich'in materials.<sup>98</sup>

To develop the Yup'ik glossary of election terms, the Division of Elections utilized an existing glossary of standard election terms in General Central Yup'ik coupled with a larger list of terms provided by the Native American Rights Fund totaling to a list of 179 terms.<sup>99</sup> The Yup'ik translation panel was able to translate the majority of those terms into the six Yup'ik dialects and

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<sup>96</sup> State of Alaska, Division of Elections, *Alaska Native Language Assistance Court Report for 2016 Primary, Regional Educational Attendance Area (REAA), and General Election*, 2016, <https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t0000000IuhR/dV38ZXYifMYlprZrG9Y89AEQBt6igJEO04EHuzMSdxY> (hereafter cited as *2016 Division of Elections Compliance Report*).

<sup>97</sup> *2016 Division of Elections Compliance Report*, p. 2 (noting that translation priority is given to election materials that are crucial for voters to make informed decisions, however due to statutory deadlines for the dissemination of these materials, printing schedules, and limited access to translators, secondary materials are not always translated).

<sup>98</sup> *Ibid.*, p. 4.

<sup>99</sup> *Ibid.*, p. 5.



reach consensus after full discussion. A remaining group of 68 terms was reviewed, but the panel did not reach consensus on the desired translation which remain to be finalized after the 2016 election cycle.

In addition to creating a written glossary, the Division of Elections is required to create an audio glossary for the election terms available in General Central Yup'ik. The Division of Elections reported recording only 74 of the election terms in General Central Yup'ik, however the remaining 105 terms were not updated and recorded for the 2016 election cycle.<sup>100</sup>

The Gwich'in translation panel was given the same list of 179 terms developed for the Yup'ik panel and was able to fully complete both a written glossary of terms and the Gwich'in audio glossary before the deadline.<sup>101</sup>

### ***(1) Composition***

For each of these panels, the Toyukak Order required the Division of Elections to select a specific number of members who understand and speak Yup'ik and Gwich'in dialects based on recommendations from the Native American Rights Fund. Election officials must also support their travel expenses and compensate members while participating on the panel. The Yup'ik translation panel must have at least eight members and the Gwich'in panel must have at least three bilingual speakers.

The Division of Elections reported exceeding the number panel members for the Yup'ik panel by one (nine total members) and for the Gwich'in panel by two (five total members).

### ***(2) Procedures for Translations***

In many cases, English terms are not found in other languages. Taking this into account, the Toyukak Order noted specific procedures for the translation panels to implement. These procedures include documenting differences in the various Alaska Native dialects in footnotes in order to produce uniform oral and written translation of election-related terminology. To confirm translations, each panel must have a majority of the members present.

The Division of Elections was able to implement this mandate which resulted in the Yup'ik glossary of election terms that included all Yup'ik dialects and Nunivak Cup'ig in on single publication. Wherever there were differences, the Division of Elections noted dialect abbreviation in the footnotes. The two panels followed varying approaches to the translation of supporting materials. The Yup'ik translation panel, due to working with multiple dialects, began by doing seed translations of materials from English into General Central Yup'ik. Materials were then given to panel members with expertise in particular dialects and their work was returned to Indra Arriaga

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<sup>100</sup> Ibid., p. 7.

<sup>101</sup> Ibid., p. 8.



or other panel members for review. The Gwich'in translation panel began by giving materials to two panel members who resided in the same village and who consulted with a third panel member in Fairbanks. Their translations were then sent to the Division of Elections and assigned to another panel member for verification.<sup>102</sup>

The Division of Elections noted that both panels worked with all members to complete the election material and stayed employed as translators and recorders.

The official election pamphlets (OEPs) presented a special challenge to the translation panels as these original materials had to be provided to Division of Elections with a 30-day window prior to the statutory guideline for submitting materials in time for inclusion in the publications. A total of 70 OEPs representing different dialects and election districts were distributed by Division of Elections by mail, email and online to the tribal councils,<sup>103</sup> regions, communities and the general public as listed in Appendix D.<sup>104</sup>

#### ***b) Language Assistance***

The Toyukak Order requires the Division of Elections to provide Yup'ik language assistance in all villages in the Dillingham Census Area and Kusilvak Census Areas. It must also provide Gwich'in language assistance in the following villages in the Yukon-Koyukuk Census Area: Arctic Village, Beaver, Birch Creek, Chalkyitsik, Circle, Fort Yukon, and Venetie.

##### ***(1) Bi-lingual Assistance at the Polls***

This bilingual language assistance must be available at the polls in the jurisdictions noted above. While the Toyukak Order did not require the Division of Elections to recruit a specific number of bilingual outreach workers in each village covered, it did require documentation of how many instances of language assistance at the polls in both the primary and general elections. A total of 235 instances of language assistance were documented where more than 80 percent of the instances involved Alaska Native languages.<sup>105</sup>

##### ***(2) Toll-Free Numbers for Language Assistance***

Having at least one bilingual translator available for each language and dialect spoken in the Dillingham Census Area, Kusilvak Census Area, and Yukon-Koyukuk Census Area to provide language assistance by phone was also required. The Toyukak Order also outlined a procedure to ensure voters received appropriate language assistance and reporting requirements to document instances of language assistance. This information includes documenting the translator's name,

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<sup>102</sup> Ibid., pp. 18-20.

<sup>103</sup> See Appendix D.

<sup>104</sup> Ibid., pp. 21-24.

<sup>105</sup> Ibid., pp. 26-27.

their language and dialect, date, and duration of the call with the voter calling the toll-free number.

The Division of Elections established a toll-free number for language assistance and distributed this number via written materials, PSAs, and the Division of Election's website. During the 2016 election cycle, only 3 of the 27 calls received were related to language assistance; all calls were for Spanish.<sup>106</sup> The toll-free line was staffed by the language assistance native language coordinator who speaks Yup'ik.

The Division of Elections reported language assistance in the mandated languages was available for the 2016 primary election and general election. During the general election, the Division of Elections provided language assistance in Yup'ik, Chevak Cup'ik Gwich'in, and Inupiaq. They received 25 calls, but only three were language related and no calls for Alaska Native languages support.

### **(3) *Training for Bilingual Poll Workers***

In-person training was also required per the Toyukak Order. The Division of Elections must also provide an opportunity for bilingual poll workers to reschedule a training or replace that poll worker if he or she is unable to attend an in-person training. In-person trainings must also be done every even-numbered year and for odd-numbered years in which a special ballot measure appears. Also, during those odd-numbered years where there is no special ballot measure, the Division of Elections must provide telephonic trainings.

With the goal of conducting an effective training, the Division of Elections must provide a reasonable amount of time to cover training topics such as election procedures, Alaska elections law, and practicing available translations among other topics.<sup>107</sup> The Division of Elections must also cover the costs for election workers who must travel to the training location this includes travel, lodging, and per diem.

The Division of Election complied by providing in-person trainings by regional office prior to the primary election and to the general election. The Region III office provided trainings in Fairbanks: trainings were one day in duration but delivered on multiple days to accommodate workers' needs. The Region IV office provided trainings in hub communities,<sup>108</sup> Dillingham and St. Mary's and Kotzebue. The contents of these trainings included information on federal voting requirements, guidelines, materials available and procedures for rendering language assistance.<sup>109</sup>

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<sup>106</sup> Ibid., pp. 9-12.

<sup>107</sup> Ibid., p. 31 (noting complete list of training topics).

<sup>108</sup> Hub communities are communities that receive frequent air service or are connected to roads.

<sup>109</sup> Ibid., pp. 29-32.

**c)      *Mandatory Pre-Election Outreach***

As part of pre-election outreach, the Division of Elections must arrange informational meetings community wide, in small groups, or one-on-one meetings to register voters and to discuss various election topics before the election such as announcing upcoming election dates, explaining ballot questions, explaining the absentee ballot application, and others.<sup>110</sup>

Pre-election outreach efforts were conducted largely through regions and through multiple avenues. The regional Division of Elections offices worked with outreach workers to ensure VHF radio announcements and notices for upcoming elections were posted. Outreach workers were also given translated PSAs to ensure consistent messages were shared across the regions. Election officials also utilized social media such as Facebook and collaborated with partner organizations such as Get out the Native Vote and Alaska Federation of Natives to keep the public informed of important dates and information needed. While several pre-election outreach efforts were made, the Division of Elections noted they were unable to adequately report/log the frequency and effectiveness of these efforts.<sup>111</sup>

**d)      *Publicity for Voter Registration and List Maintenance***

Who to target, how and when to conduct publicity, and frequency was specified in the Toyukak Order.<sup>112</sup> The Division of Elections was required to broadcast public service announcements to specific radio stations in specific dialects and be made at least five days before each election and each deadline at least three announcements a day on weekdays for three days. The content of the PSA included deadlines to register to vote, toll-free number for language assistance for any questions, availability of absentee voting, and others.<sup>113</sup> With regard to list maintenance, the PSA must include information pertaining to the importance, steps to take to ensure the voter remains on the rolls, and a toll-free number for language assistance for any questions.<sup>114</sup>

The Division of Elections reported translations of PSAs were made available in written form to the tribes and outreach workers, as well as posted online. In addition, translated PSAs were broadcast by numerous radio stations, on multiple occasions and frequencies throughout the mandated regions and in the specified languages during the periods prior to the primary election and to the general election. Similarly, the list maintenance PSA was broadcast on multiple dates and times, in several languages and regions. Based on the report, there was no documentation that broadcasts were made in the Gwich'in language.<sup>115</sup>

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<sup>110</sup> Ibid., p. 35.

<sup>111</sup> Ibid., p. 36.

<sup>112</sup> Ibid., pp. 36-37.

<sup>113</sup> Ibid., pp. 38-39.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid., pp. 37-45.

***e) Touchscreen Voting Machines***

According to the Toyukak Order, touchscreen voting machines must be available at all polling places on Election Day when there are federal races on the ballot. If more than one language and dialect for a village is mandated, then the audio translation on the touchscreen voting machine must be provided in one language and dialect identified by the Yup'ik translation panel. Audio translations must also be included for all audio information and instructions provided on the machine in English. In the event audio translations cannot be uploaded onto the touchscreen voting machines, the Division was asked to provide the voter with access to the audio translation in an alternative format and provide the voter with a translated sample ballot. Finally, poll workers must be trained on how to use the audio language assistance on these machines.

The Division of Elections reported successfully loading respective regional/precinct languages onto all touch screen voting machines with the audio files recorded by language panel members. They also reported that translated ballots and sample ballots were available for every election.<sup>116</sup>

***f) Sample Ballot***

The Division of Elections was also required to continue posting on its webpage and provide written sample ballots to tribal councils, outreach workers, and poll workers. Written bilingual sample ballots must also be available at the Division of Election's four regional offices and at the Mat-Su Office.

Election officials asserted they made the appropriate bilingual sample ballots available throughout the election cycle, including primary, Regional Educational Attendance Area, and the general election.<sup>117</sup> These were posted online, given to outreach workers, sent to tribes, included in the official election pamphlets, and made available at the appropriate voting locations. During the period prior to the primary election, a mail-out of sample ballots/instructions was not sent to the tribes. The Division of Elections corrected this error by sending the materials via e-mail.<sup>118</sup>

***g) Voter Registration***

The Division of Elections must ensure that each tribal council has an adequate supply of voter registration forms. Similarly, it must post proper signage in the applicable language in the village identifying the availability of voter registration forms, language assistance to register, and the name and phone number of the bilingual registrar and/or the Division of Election's toll-free number for language assistance.<sup>119</sup>

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<sup>116</sup> Ibid., pp. 45-46.

<sup>117</sup> Ibid., pp. 47-51.; *But see infra* section II on the Division of Elections' Current Challenges

<sup>118</sup> Ibid., pp. 47-51; *See* Appendix E

<sup>119</sup> Ibid., p. 52.

Election officials reported voter registration forms were available at all voting locations, online and were sent to the tribes and the Alaska Federation of Natives<sup>120</sup> To increase voter registration, the Division of Elections also worked with other partners and registrars.

#### ***h) Permanent Absentee Voting***

In the three census areas subject to the Toyukak Order, the Division of Elections must have at its permanent absentee voting sites resident bilingual workers available throughout scheduled absentee voting with a notice posted in public places in the covered languages. Signage must include the name, phone number, location of the bilingual worker informing voters that language assistance is available. Bilingual poll workers must be trained in-person and be fully bilingual and literate in English and the dialect spoken in the village.

Notably, the Division of Elections reported major staffing difficulties in maintaining consistent bilingual services for permanent absentee voting in both sites in Region III and in Region IV.<sup>121</sup> In Pitka's Point, one of the two Region IV permanent absentee voting sites,<sup>122</sup> staffing was present, but the Division of Elections was unable to document a proper log, so the nature of language assistance offered is unknown.<sup>123</sup> As a result of inconsistent staffing of bilingual poll workers to help at the permanent absentee voting sites in Region III, the Division of Elections worked with the Tanana Chiefs Conference (TCC) to fly a TCC employee to receive training to provide language assistance on Election Day.

#### ***i) Questioned Ballots***

The Division of Elections are required to provide all voters who vote a questioned ballot process in the covered language and dialect. Bilingual poll workers may provide information and notices about the questioned ballot processes orally.<sup>124</sup>

Election officials note that bilingual election workers were trained in handling questioned ballots, but logs do not indicate any instances of questioned ballots needing language assistance.<sup>125</sup>

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<sup>120</sup> Ibid.

<sup>121</sup> See *supra* Figure 2 for map of settlement areas.

<sup>122</sup> The two sites are Pitka's Point and Twin Hills.

<sup>123</sup> 2016 *Division of Elections Compliance Report*, pp. 52-54.

<sup>124</sup> Ibid., p. 54.

<sup>125</sup> Ibid., pp. 52-54.

## ***II. Division of Elections' Current Challenges***

Following the issuance of the Toyukak Order the Division of Elections made progress in improving the language assistance mandated by the settlement. In many aspects, developing translations of materials, finding and training staff for outreach and assistance at the polls, the Division of Elections was obliged to start virtually from scratch to fulfill the required outcomes. Thus, their report exhibits a great number of accomplishments and a noteworthy effort to achieve near compliance. Indeed, in some respects, the Division of Elections took beneficial steps beyond the minimal standards of the Toyukak Order.<sup>126</sup> Nonetheless, the Report also identifies areas that remain challenges for the Division in the areas of completing language access materials and outreach efforts.

### ***a) Language Access Materials***

Election officials recognized that some glossary and supporting materials remained to be completed: (i) 68 terms in the Yup'ik glossary required consensus;<sup>127</sup> (ii) the audio glossary did not yet include the additional Yup'ik terms beyond the previously existing list of 74 items;<sup>128</sup> (iii) though the Division of Elections asserts that no demand existed for translations in the Nunivak area for the 2016 election cycle, the Division of Elections anticipates establishing a translation panel for those materials as future needs are likely to arise;<sup>129</sup> and (vi) some translations of election materials in Bristol Bay Yup'ik, Norton Sound Yup'ik, and Yukon Yup'ik dialects were either incomplete or unverified at time of election.<sup>130</sup>

Completing the OEP presented an ongoing challenge for the Division of Election's translation capabilities as it relies on the progress of language panels. Given that materials to be translated in the OEP can be submitted until a date relatively close to the election itself, the translations must be completed on a short timeline. The large number of languages/dialects and the likelihood that such a number will increase necessitates a great amount of work at a time of the year when many of the translation panel members have other demands on their schedules.<sup>131</sup>

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<sup>126</sup> For example, the Division of Elections hosted a ballot measure listening station at Alaska Federation of Natives, was in partnership with Division of Community and Regional Affairs for additional support, provided a presentation for organizations, created video PSAs, engaged voters through social media, and hosted a language summit.

<sup>127</sup> 2016 Division of Elections Compliance Report, p. 4; Indra Arriaga, testimony, *Briefing before the Alaska Advisory Committee to the U.S. Commission on Civil Rights*, Anchorage, AK, August 2, 2017, transcript, p. 4, [https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005oAp/JeEJVBDfrlc2eeWt\\_drdzORPLr4XxzNw777boxfIHZQ](https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005oAp/JeEJVBDfrlc2eeWt_drdzORPLr4XxzNw777boxfIHZQ), (hereafter cited as *Anchorage Briefing*).

<sup>128</sup> 2016 Division of Elections Compliance Report, p. 7.

<sup>129</sup> Ibid., p. 4; Arriaga Testimony, *Anchorage Briefing*, p. 44.

<sup>130</sup> 2016 Division of Elections Compliance Report, p. 19.

<sup>131</sup> Ibid., p. 21.

Distributing the OEP is also challenge when targeting households who have limited English proficient and Alaska Native language speaking registered voters.<sup>132</sup> In the 2016 election cycle, the Division of Elections produced 70 OEPs<sup>133</sup> translated in Alaska Native languages and that number may increase in future cycles. At present, the distribution of the official election pamphlet is governed by conflicting statutes. One mandate specifies that official election pamphlet must be distributed to households;<sup>134</sup> however, the Division of Elections argues that it does not have a means of identifying which languages (and consequently which official election pamphlet) are needed in which households. The alternative requirement is to send the official election pamphlet to various tribal authorities and partnerships, though this is not necessarily the most direct means of distribution.<sup>135</sup>

### ***b) Outreach to Alaska Native Communities***

Staffing for bilingual poll workers and outreach workers represents an ongoing challenge to the Division of Elections. The number of polling places, coupled with the number of dialects which must be provided, establishes a framework for staffing which is inherently difficult. Further, the issue of compensation exacerbates the difficulty: existing rates of pay for election workers may be insufficient to provide a pool of qualified staff.<sup>136</sup>

One admittedly small sample which may nonetheless be illustrative of the staffing difficulties can be seen with the Permanent Absentee Voting sites in Region III and IV. In only these four sites, two in each region, the Division of Elections experienced a trained worker who withdrew prior to the election; a replacement worker who received training but apparently provided no services and then left the community; two workers who did not submit a log reporting requests for language assistance; and a replacement worker who had to be minimally trained and flown into a site on Election Day.<sup>137</sup>

Training of poll workers and outreach workers was provided at the regional level. The settlement order specifies a very full list of content items for these trainings: 17 items to be covered in language assistance trainings, with another 12 topics to be covered in outreach sessions.<sup>138</sup> While the Division of Elections was able to report where and when in-person trainings were held, the Division of Elections reports the need for developing better materials for tracking the frequency and impact of training and outreach efforts.<sup>139</sup> Furthermore, the Division acknowledges that each

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<sup>132</sup> Arriaga Testimony, *Anchorage Briefing*, p. 47.

<sup>133</sup> See Appendix D.

<sup>134</sup> Ibid., pp. 60-64

<sup>135</sup> Ibid., p. 22

<sup>136</sup> Ibid., p. 54.

<sup>137</sup> 2016 Division of Elections Compliance Report, pp. 52-54.

<sup>138</sup> Ibid., pp. 30-36.

<sup>139</sup> Ibid., p. 37; Arriaga Testimony, *Anchorage Briefing*, p. 54.

regional office conducts their own procedures to solicit feedback on the quality and effectiveness of their training and will examine ways to assess the effectiveness of their trainings.<sup>140</sup>

The Division of Elections acknowledges the need to develop more effective internal data management processes to track the effectiveness of its efforts in providing materials, training, and outreach.<sup>141</sup> For example, the Division of Elections distributed surveys for feedback on the quality of the OEPs. While 70 surveys were distributed, only seven were returned.<sup>142</sup>

## **B. Implementation in Practice Through the Lens of Alaska Voters**

The previous section explains the Toyukak Order in some detail, while this section focuses on implementation “in practice,” meaning the way in which the judgment was put into effect. As directed by the Toyukak Order, most of the implementation was performed by the Division of Elections of the State of Alaska, but all levels of government (federal, state, borough, city) were involved, as were Alaska Native organizations.

The first two sections of this section are drawn from the compliance report of the Division of Elections and the response of Dr. James Tucker, who noted, “the Division of Elections had made a lot of progress, but they’ve got a lot of work left to do because we’re dealing with the situation where...no language assistance was provided for the first four decades of [Section 203] coverage”<sup>143</sup> and recognizes that “you can’t come to compliance overnight”<sup>144</sup> when referring to the challenges with providing training and producing and distributing election materials. In turn, Tucker’s testimony is based on documented federal observer reports noting deficiencies under Section 203 and the Toyukak order in the August and November 2016 elections.

### ***I. Poll Worker Training***

While the Division of Elections reported on substantive progress in implementing the Toyukak Order in the area of poll worker training, Dr. James Tucker testified on deficiencies in training of election poll workers based on a report documented by federal observers present at the August 2016 primary and November 2016 general elections. He asserted, “overall, training fell far short of the goal of mandatory training (with an emphasis on in-person training) for poll workers.” Mr. Tucker explained less than half—46 percent (55 poll workers)—received training in 2016; 4 percent (5 poll workers) received training at least a year earlier, in 2015; 10 percent (12 poll workers) received training two or more years earlier (mandatory training was to have been done biennially); 39 percent (47 poll workers) had never been trained. He added that those who received training reported it was conducted in English by a non-Native instructor from the Division of

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<sup>140</sup> Arriaga Testimony, *Anchorage Briefing*, p. 55.

<sup>141</sup> 2016 Division of Elections Compliance Report, p. 37; Arriaga Testimony, *Anchorage Briefing*, p. 59.

<sup>142</sup> 2016 Division of Elections Compliance Report, pp. 22, 24.

<sup>143</sup> Tucker Testimony, *Anchorage Briefing*, p. 66.

<sup>144</sup> Ibid.



Elections and bilingual poll workers were not trained on how to translate the contents of the ballot or how to provide procedural instructions in Yup'ik and Gwich'in.

In analyzing the amount of language assistance provided, Mr. Tucker argued there was inadequate staffing at the 2016 primary and general elections. Notably, “federal observers were unable to document how much bilingual assistance and translations, if any, were available in covered villages in the three census areas prior to Election Day. However, the lack of bilingual poll workers in many polling places in those areas suggests that much work remains to be done to provide full and equal access to the election process before and on Election Day.”<sup>145</sup> He referenced the following instances noted in the federal observers' reports:

- During the August 2016 Primary Election, no bilingual poll worker was available at any time in 3 out of 19 villages. Among the other 16 villages, in Koliganek, a bilingual poll worker was only available “on call” and was not present in the polling place; and in three villages (Dillingham, Kotlik, and Marshall) the bilingual poll workers left the polling place during a portion of the time the polls were open, and there was no assistance available during their absence.
- During the November 2016 General Election, no bilingual poll worker was available at any time in 1 out of the 12 villages observed. In Fort Yukon, there was no language assistance available for at least 80 minutes when the bilingual poll worker left and in Venetie, the only bilingual poll worker left the polling place 3 ½ hours before the polls closed and did not return.<sup>146</sup>

## ***II. Translation of Election Materials***

Dr. Tucker testified that there was a lack of translated written materials required under the Toyukak Order despite reporting from the Division of Elections that the majority of materials had been translated. For example, when federal observers visited 19 villages during the August 2016 primary election, they found: no translated voting materials were available in six villages (Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie);<sup>147</sup> the ‘I voted’ sticker was the only material in an Alaska Native language in Marshall and Mountain Village; in Emmonak, the Yup'ik glossary was the only translated material available; and 10 villages had a sample ballot written in Yup'ik but only two (Koliganek and Manokotak) had written translations of the candidate lists.<sup>148</sup>

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<sup>145</sup> James Tucker, Written Statement for the Alaska Advisory Committee to the U.S. Commission on Civil Rights, p. 4, <https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt00000000DT4TAAW> (hereafter cited as *Written Testimony*); See Appendix G.

<sup>146</sup> *Ibid.*, p. 5.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

When federal observers returned to investigate the November 2016 general election, among 12 villages, six out of 12 polling places did not have a translated sample ballot available for voters; five of those villages had no sample ballot at all (New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie); and Fort Yukon had a Gwich'in sample ballot that was kept at the poll worker's table and not made available for voter use. Notably, federal observers stated the absence of translated voting materials had its greatest impact in polling places that did not have a bilingual poll worker present during all election hours. More pointedly, the lack of written translations in those locations meant no language assistance of any kind was provided and the lack of trained bilingual poll workers in some polling places contributed to the lack of language assistance.<sup>149</sup> Based on these observations, Mr. Tucker commented that Alaska "is still far short of compliance with the mandates of the Toyukak Order and Section 203's requirements,"<sup>150</sup> and recommended that the Division of Elections to use its resources to comply with the two language groups and attendant dialects covered by the Order as well as making efforts to comply with the 2016 update of the Section 203 covered languages.<sup>151</sup>

### ***III. Disparate Impact***

Panelists asserted the implementation of the Toyukak Order did not have an even impact throughout Alaska. In particular, panelists argued that language assistance and translation services varied between rural and urban areas of Alaska; between Alaska Native and non-Native areas; and areas covered by Section 203 and other areas with Native of other significant language minorities. Nicole Borromeo observed that during the Parnell Administration, absentee voting opportunities were not provided in rural Alaska on a par with urban areas of Alaska.<sup>152</sup> In the area of training opportunities, an election worker remarked that training time in rural areas was conducted over the phone for 10-20 minutes, which she found to be insufficient to administer early/absentee voting effectively.<sup>153</sup>

Staffing was also in question regarding its potential impact on Alaska Native voters who may require language assistance. Mr. Tucker offered an example by comparing the size of Alaska census areas to those in the lower-48 states and the number of bilingual election staff. He stated, "despite the tremendous size of Section 203-covered areas and the distances between rural villages and permanent Division of Elections offices, the number of personnel working on administering elections in those areas is minimal." Comparing New Mexico, a state with an area substantially smaller than one of Alaska's covered census areas, the state has more full-time language coordinators fluent in native languages and has bilingual county clerks and support staff, whereas Alaska has just two full time bilingual workers and "relies heavily on a patchwork of contract

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<sup>149</sup> Ibid., pp. 5-6.

<sup>150</sup> Ibid., p. 6.

<sup>151</sup> Ibid.

<sup>152</sup> Borromeo Testimony, *Anchorage Briefing*, p. 86.

<sup>153</sup> Sarina Merlino Testimony, *Anchorage Briefing*, p. 120.

translation panels and part-time outreach workers whose reliability and efforts vary considerably from person to person.”<sup>154</sup>

Concern over the quality of election equipment distributed throughout Alaska was raised by an election worker. Katrina Merlino asked “why [do] offices in urban areas get nice election equipment and privacy stations and we only get one?”<sup>155</sup> In addition, the Bristol Bay Native Corporation (BBNC) submitted photos to demonstrate the difference between an urban polling location and a rural polling location.<sup>156</sup>

Finally, a panelist provided insight to improving voter registration among rural Alaska Native eligible voters. Rose Wassillie, Resource Specialist for BBNC for the villages of Togiak, Manokotak and Twin Hills, responded to a question posed by a Committee member about improving election administration, saying: “(T)he only thing that works in rural communities...is television and if we can get all the languages, like the Yup’ik language, the Tlingit language and Aleut... through the State of Alaska and make it like a commercial, like months before the election and get the vote out and start advertising it . . . there will be a better and a bigger turnout on Election Day.”<sup>157</sup>

#### *IV. Efforts of Alaska Native Organizations*

Alaska Native organizations, Corporations and individuals engaged in a significant amount of self-help in order to enfranchise the Alaska Native community before and after the implementation of the Toyukak Order. The following testimonies describe these efforts.

Nicole Borromeo, Executive Vice President and General Counsel of Alaska Federation of Natives, testified to the role of her organization in successfully establishing early voting locations in 128 Alaska Native villages, a task that should be performed by the Division of Elections.<sup>158</sup> Ms. Borromeo recounted the difficulty with working with the former Lieutenant Governor in encouraging the establishment of early voting sites and said, “the [S]tate...was unwilling... to recognize that voting disenfranchises...Alaska Natives throughout rural Alaska [and] was a legitimate problem”<sup>159</sup> and once the State allowed her to begin organizing, the State created a “multi-step cumbersome process.” AFN’s involvement was critical to establishment of these sites.

Sarah Obed, Vice President of External Affairs, Doyon Corporation, explained that her regional corporation, for 30 years, had been involved in a Get-Out-the-Native-Vote initiative, advocating for improved access (e.g., through early and extended voting opportunities) and working against

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<sup>154</sup> Tucker Testimony, *Written Testimony*, p. 2.

<sup>155</sup> Mulipola Testimony, *Written Testimony*, p. 2.; See Appendix H.

<sup>156</sup> See Appendix H.

<sup>157</sup> Wassillie Testimony, *Anchorage Briefing*, p. 131.

<sup>158</sup> Borromeo Testimony, *Anchorage Briefing*, pp. 102-03; Bahnke Testimony, *Anchorage Briefing*, pp. 145-46.

<sup>159</sup> Borromeo Testimony, *Anchorage Briefing*, pp. 102-03.

limitations such as voter ID requirements.<sup>160</sup> Efforts of Doyon included partnerships with the non-profit organizations Tanana Chiefs Conference (TCC) and Fairbanks Native Association (FNA).

Finally, Bristol Bay Native Corporation (BBNC) election workers residing in the Dillingham census area shared examples of their corporation's proactive efforts to get out the vote. Ms. Merlino stated that she went out to pick up Koliganek voters in four-wheelers on Election Day and brought to the polls to vote and then returned back to their homes.<sup>161</sup> In another example, Ms. Wassillie shared that the BBNC even provided gasoline for transportation to and hired two people to work in the community to register voters, a cost that would have been absorbed by the Division of Elections.<sup>162</sup>

## **A. Examining the Potential Impact of a Vote by Mail System**

The Committee sought to understand the potential impact of a vote by mail system on Alaska Native voters as the State considers alternative voting methods for state and federal elections. Josie Bahnke, director for the Division of Elections testified to the State's tentative strategy in addressing its impending fiscal challenges. Looming issues require input from the State's Election Policy Work Group, a diverse body of stakeholders to discuss "how to make Alaska's election system as effective, cost efficient and responsible to Alaska voter needs as humanly possible" and whose resounding principle is "if it does not work for rural Alaska, it will not work for Alaska."

<sup>163</sup> Based on discussions to date, the Election Policy Work Group is "drawn [to] more of a hybrid system in rural Alaska that would include a very strong early in-person, 15 days prior to the election, in-person voting option and also a vote by mail option."<sup>164</sup> This system would entail that every registered voter in the state would be sent a ballot in the mail and would have the following options to return their ballot: (i) return ballot by mail and (ii) go to their local city hall or tribal facility and return the ballot there. Ms. Bahnke explained the benefit of returning the ballot through this method is that voters can receive language assistance and voters with disabilities may also receive assistance in person. The Division of Elections must consider several procedural changes in order to fully execute a hybrid system that combines in-person voting and vote by mail such as: geographical challenges in mailing out ballots, training voting officials in rural areas on all aspects of election management, how to mail out ballots, how to track ballots, how to get replacement ballots to voters, how to send translated materials to communities who need them, and how to inform voters of the proposed changes should they go into effect and any changes regarding deadlines, how to ensure each voter receives just one ballot in a primary election instead of three ballots. Then, in terms of receiving ballots, how to review counting of all ballots, especially on a

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<sup>160</sup> Hayton Testimony, *Anchorage Briefing*, p. 116.

<sup>161</sup> Sarina Merlino Testimony, *Anchorage Briefing*, pp. 131-32.

<sup>162</sup> Wassillie Testimony, *Anchorage Briefing*, p. 138.

<sup>163</sup> Bahnke Testimony, *Written Testimony*, p. 4.

<sup>164</sup> *Ibid.*, p. 151.

regional level, and how to deter and detect potential voter fraud.<sup>165</sup> “[A]ny change to Alaska’s election system is going to take a lot of discussion up front and will take a lot of time, so coordination with [stakeholders] to discuss solutions [and] to maximize accessibility to the ballot for Alaska is absolutely necessary.”<sup>166</sup>

Another effort on behalf of the Election Policy Work Group was to assess rural voters’ perceptions about different voting methods, especially those located in the Bethel, Dillingham, and Kusilvak census areas. Researchers, who conducted the survey entirely in English, found that 60 percent of rural voters preferred to receive their ballot in person on Election Day, 21 percent preferred to receive it by mail, and 17 percent prefer to receive their ballot online. When asked about potential changes to voting methods, 49 percent of rural voters prefer to keep the current voting method as it is, 36 percent prefer to receive their ballot in the mail and have different ways to return it, and 14 percent preferred to mail out and mail back.<sup>167</sup>

### *I. Challenges*

As a key stakeholder in the pursuit for implementing vote by mail statewide, Ron Haberman, Alaska district manager for the U.S. Postal Service (USPS) testified to specific challenges with mail delivery unique to Alaska. He demonstrated three examples where the USPS experienced issues with sending and receiving election mail to customers. First, he noted that with election mail delivery, his office had to return ballots due to poor mail piece design.<sup>168</sup> To address this issue, his office worked with election mail officials to ensure that the ballots are designed with an IMB barcode, which allows the USPS to track election mail. Second, in explaining how customers receive their mail, he noted that the USPS villages typically transfer mail from villages to the Anchorage central hub, where it is postmarked. He explained that customers can get their mail postmarked and/or receive any mail services by visiting a local post office, but disclosed there has been a challenge with employing and retaining postmasters residing in rural parts of the state.<sup>169</sup> Finally, he indicated that training roughly 600,000 post office workers in handling election-related material has been a difficult task, but assured the Committee that the USPS is working to address this issue before going into the next election cycle.<sup>170</sup>

From an academic perspective, Dr. Dietrich shared that vote by mail “creates the opportunity for logistical and administrative problems,” which may include local election officials not receiving the ballot, difficulties in verifying registration or identifying who the voter was, the voter not receiving the ballot, etc.<sup>171</sup> He also warned that “people can do terrible things when nobody’s looking over their shoulder,” suggesting that there is increased opportunity for malfeasance if

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<sup>165</sup> Thompson Testimony, *Anchorage Briefing*, pp. 153-55.

<sup>166</sup> *Ibid.*, p. 155.

<sup>167</sup> See *Perceptions of Universal Ballot Delivery Systems*, pp. 18-21 (describing methodology).

<sup>168</sup> Haberman Testimony, *Anchorage Briefing*, p. 186.

<sup>169</sup> *Ibid.*, pp. 186-87.

<sup>170</sup> *Ibid.*, p. 186.

<sup>171</sup> Dietrich Testimony, *Web Hearing I*, p. 4.

states administer elections by mail.<sup>172</sup> These issues are “exacerbated when vote by mail schemes are in effect” and supported his statement by referencing two studies that discuss the “lost votes” dynamic that occurs when elections are conducted by mail.<sup>173</sup> In 2008, Cal Tech/MIT’s Voting Technology Project found that 7.5 million, or approximately one-in-five individuals who attempted to voice by mail are lost somewhere in the pipeline.<sup>174</sup> This finding is further supported by a smaller study where at least 13 percent of Minnesota’s mail-in ballots were rejected in error.<sup>175</sup> Raising concern with the number of votes lost, he explained “20 percent would absolutely turn in most elections” and “lost votes... often gets overlooked in vote by mail” system.<sup>176</sup>

Alaska Native voters plainly stated that moving to vote by mail elections “would not work in rural Alaska because the mail system is too slow” and can take up to 2-3 weeks to receive mail.<sup>177</sup> The majority of mail delivery to villages relies on air service, however delivery may be inaccessible by air for several weeks due to inclement weather and at times, flights may be cancelled even in good weather conditions.<sup>178</sup> Dr. Dietrich asserted vote by mail as a primary way of participating in the system is “questionable” and should not be seen as a “silver bullet to correct participation problems created by distance.” Furthermore, he testified that “it doesn’t increase turnout...creates logistical issues with collecting and registering votes, [i]t exacerbates trust issues, and only provides a somewhat limited portal to participation in democratic institution and process.”<sup>179</sup>

## ***II. Complying with Section 203 of the Voting Rights Act***

Panelists presented potential solutions that would address providing language access in a vote by mail system. Tammy Patrick, senior advisor at the Democracy Fund testified to the plausibility of providing language assistance in a vote by mail environment, especially providing language assistance in an unwritten language based on her experience with administering elections to remote Native American voters. Ms. Patrick, who worked as a local election administrator in Arizona, explained that developing a robust language outreach program is a necessary step to engage remote voters. She asserted that a successful approach to engage older Native American voters from the Tohono O’odham tribe was to send their ballots early to ensure they had more time to read through its contents and receive language assistance if needed. In addition, she coordinated with tribal leadership to have translators on hand a week before Election Day to discuss with elders the content

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<sup>172</sup> Ibid.

<sup>173</sup> Dietrich Testimony, *Web Hearing I*, p. 4.

<sup>174</sup> Charles Stewart III, *Losing Votes by Mail*, N.Y.U. J. LEGIS. & PUB. POL’Y Vol. 13, 573-602, 580 (2010).  
<https://pdfs.semanticscholar.org/399a/7714f8e65501363c93e508895bd4d4f9ff13.pdf>.

<sup>175</sup> Alec Yasinsac, “Did your mailed ballot count: The unrecognized unreliability of voting by mail,” *U. of S. Ala. School of Computer and Information Sciences*,  
[http://www.iiis.org/CDs2011/CD2011SCI/PISTA\\_2011/PapersPdf/PA468KX.pdf](http://www.iiis.org/CDs2011/CD2011SCI/PISTA_2011/PapersPdf/PA468KX.pdf).

<sup>176</sup> Dr. Joseph Dietrich, testimony, *Web Hearing before the Alaska Advisory Committee to the U.S. Commission on Civil Rights*, Web Hearing, June 19, 2018, transcript, p. 4, [https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005oOJ/PuL5b.gc8z\\_V9eM6Q\\_T4pLeY4.uF0EmHs3O5a9HIuBs](https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005oOJ/PuL5b.gc8z_V9eM6Q_T4pLeY4.uF0EmHs3O5a9HIuBs) (hereafter cited as *Web Hearing I*).

<sup>177</sup> Mulipola Testimony, *Written Testimony*, pp. 1-2.

<sup>178</sup> Tucker Testimony, *Written Testimony*, p. 7.

<sup>179</sup> Dietrich Testimony, *Web Hearing I*, p. 10.

of their election ballots and gave them the opportunity to either fill out their ballots on the spot and return them to a secure ballot box, take them home and mail them, or drop them off at the polls on Election Day.

In contrast, Jim Tucker, argued that while vote by mail worked in Maricopa County, Arizona with the Tohono O’odham is “inapposite and ill-suited for Alaska’s proposed vote by mail procedures.” He raised issue with her use of two precincts in Maricopa County because those areas are geographically different, in that they are fully accessible by road and can be driven from the nearest metropolitan city, Phoenix, whereas in Alaska, many Alaska Native villages subject to Section 203 requirements are not as accessible. He argued weather conditions do not preclude regular mail delivery to either of those communities and argued that “geographical and linguistic isolation and weather conditions in Alaska are unlike the conditions faced in Arizona.” Alaska is also unique in that there are “tens of thousands of speakers of Alaska Native languages, with nearly 7,000 limited-English proficient voting age-citizens residing in one of the fifteen covered regions in Alaska.” He asserted that the challenges with providing “complete, accurate and uniform translations are far greater than any language group in the Lower Forty-Eight” and those successes noted in Ms. Patrick’s example could not translate if applied in Alaska.

Furthermore, Mr. Tucker argued that should the State move forward with because elections administrators already face challenges with providing language assistance, this issue will be “magnified two-hundred-fold – the approximate number of isolated Alaska Native villages.” The solution to the proposed mandate would be to have voting centers in each Native village staffed by fully qualified and trained bilingual individuals willing to work for an extended pre-election and election period to comply with Section 203.<sup>180</sup>

### ***III. Best Practices***

Panelists provided examples of important steps to implement a vote by mail system. Tammy Patrick shared several considerations, one of which includes, visibility of election mail in the mail stream. The use of distinctly designed envelopes and the official election mail logo aids in delivery and allows for better messaging to voters, and clear voting instructions.<sup>181</sup> Echoing a similar testimony to Paul Gronke regarding the need for a high functioning USPS,<sup>182</sup> she stated, “a transition to vote by mail... is really leveraging...existing infrastructure that’s already being utilized”<sup>183</sup> and called for strong collaboration with the USPS. How a voter receives a postmark on their ballot is also an important consideration to ensure votes get counted. She testified that ballots may not get postmarked because of the way it is processed through the mail stream and that ballots must be round stamped prior to being tabulated. For example, mail from villages is often

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<sup>180</sup> Tucker Testimony, *Anchorage Briefing*, pp. 7-8.

<sup>181</sup> Patrick Testimony, *Anchorage Briefing*, p. 161.

<sup>182</sup> Gronke Testimony, *Anchorage Briefing*, p. 179.

<sup>183</sup> *Ibid.*, p. 162.

postmarked in Anchorage and can be postmarked days later<sup>184</sup> meaning that election ballots may not be counted even if mailed out on time.

Subsequently, she encouraged the development of a tracking mechanism to allow for USPS to track ballots and identify if they were turned in before the deadline. She recommended election officials to apply the intelligent mail barcode on their election mail design.<sup>185</sup> The use of “informed delivery” as it requires taking an image of the mail which then is automated and allows for voters to sign up to receive an email notifying them of the status of their mail.

Other best practices noted involve improving voter registration rolls. Mr. Gronke suggested for the State to integrate its list with a national change of address database using postal delivery to check the accuracy of the addresses.<sup>186</sup>

## **VI. FINDINGS AND RECOMMENDATIONS**

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>187</sup>

Below, the Committee offers to the Commission a summary of findings identified throughout the Committee’s inquiry. Following these findings, the Committee proposes for the Commission to consider several recommendations that apply to federal agencies and state actors.

### **A. Findings**

The Committee notes that Section 203 of the VRA, Title VI and Executive Order 13166 constitute federal law and, despite the potential expiration of the specific terms of the Toyukak Order in 2020 (should it not be extended as recommended below), these three laws remain fully enforceable.

#### **Findings regarding the implementation of the Toyukak Order:**

1. While the Toyukak Order requires language assistance and election materials in Yup’ik and Gwich’in in the Dillingham, Kusilvak, and Yukon-Koyukuk Census Areas, the State

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<sup>184</sup> Haberman Testimony, *Anchorage Briefing*, p. 190.

<sup>185</sup> Ibid., p. 163.

<sup>186</sup> Gronke Testimony, *Anchorage Briefing*, p. 178.

<sup>187</sup> 45 C.F.R. § 703.2.



is also obligated to comply with Section 203 covered languages<sup>188</sup> in other regions within the state.<sup>189</sup>

2. Federal observers present during the 2016 Primary and General Elections documented the following training deficiencies under Section 203 and the Toyukak Order:
  - a. Although training for poll workers is supposed to be mandatory, and is supposed to emphasize in-person training, it fell short of that goal. In 2016, 46 percent (55 poll workers) received training, 4 percent (5 poll workers) received training at least a year earlier, 10 percent (12 poll workers) received training two or more years earlier, and 39 percent (47 poll workers) had never been trained.<sup>190</sup>
  - b. Trainings were conducted exclusively in English by a non-Native instructor from the Division of Elections.
  - c. Bilingual poll workers were not trained on how to translate contents of the ballot or how to provide procedural instructions in Yup'ik and Gwich'in.<sup>191</sup>
3. The Division of Elections is required to conduct pre-election outreach through arranging informational meetings community wide, in small groups, or one-on-one meetings to register voters and provide election information such as what will be on the ballot.<sup>192</sup> While the Division of Elections claimed to have met these requirements, they were unable to adequately report/log the frequency and effectiveness of mandatory pre-election outreach.<sup>193</sup>
4. Inadequate staffing of bilingual poll workers in the three Census Areas suggests that some limited English proficient voters may have not received bilingual assistance and translations necessary to cast their ballot on Election Day. For example, federal observers found that some villages had no bilingual poll worker available,<sup>194</sup> bilingual poll workers were only available on call or available for a limited time,<sup>195</sup> poll workers left the polling

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<sup>188</sup> See Appendix I for Section 203 covered languages in Alaska.

<sup>189</sup> Levitt Testimony, *Anchorage Briefing*, p. 29.

<sup>190</sup> Tucker Testimony, *Written Testimony*, p. 4.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, p. 36.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*, p. 5 (noting that during the 2016 Primary Election, no bilingual poll worker was available at any time at 3 out of 19 villages and in November during the General Election, no bilingual poll worker was available at any time in one out of the 12 villages observed).

<sup>195</sup> *Ibid.* (noting that during the 2016 Primary Election, a bilingual poll worker was only available “on call” and was not present in the polling place in Koliganek. In the November 2016 General Election, there was no language assistance available for at least 80 minutes in Fort Yukon).

location with no assistance available during their absence,<sup>196</sup> or poll workers left early before the polls closed and did not return.<sup>197</sup>

5. The Division of Elections fell short of complying with translation requirements. They reported that they were able to complete all translation requirements for election materials in Gwich'in,<sup>198</sup> but not all materials in Yup'ik dialects.<sup>199</sup>
6. Translated written materials required under the Toyukak Order were unavailable in numerous locations. Federal observers monitoring the 2016 Primary and General Elections identified the following deficiencies:
  - a. During the 2016 Primary Election, no translated voting materials were available in 6 of the 19 villages; the "I voted" sticker was the only material in an Alaska Native language in Marshall and Mountain Village; in Emmonak, the Yup'ik glossary was the only translated material available; and only two villages, Koliganek and Manokotak, had written translations of the candidate lists.
  - b. During the 2016 General Election, half of polling places observed had a translated sample ballot available for voters. Five of those villages had no sample ballot at all<sup>200</sup> or if a translated ballot did exist, it was not made available for voter use.<sup>201</sup>
7. In comparison with New Mexico, a state with a high number of limited English proficient voters requiring American Indian language accommodations, it employs eight full-time language coordinators, whereas Alaska<sup>202</sup> has just two full-time bilingual workers to carry out the implementation of the Toyukak Order. Alaska also relies on Yup'ik and Gwich'in language panels and part-time outreach workers.<sup>203</sup> While the Toyukak Order requires hiring one permanent elections language compliance manager to implement it, there is concern that current language access efforts may be insufficient to accomplish meaningful implementation.

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<sup>196</sup> Ibid. (noting that during the 2016 Primary Election, the bilingual poll worker left the polling place during a portion of the time the polls were open and there was no assistance available during their absence in Dillingham, Kotlik, and Marshall).

<sup>197</sup> Ibid. (noting that during the 2016 General Election, the only bilingual poll worker in Venetie left the polling place 3 ½ hours before the polls closed and did not return).

<sup>198</sup> 2016 Division of Elections Compliance Report, p. 4.

<sup>199</sup> Ibid., pp. 2, 7, 19.

<sup>200</sup> Ibid. (noting that no sample ballot was available at New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie).

<sup>201</sup> Ibid. (noting that Fort Yukon had a Gwich'in sample ballot that was kept at the poll worker's table and not made available for voter use).

<sup>202</sup> "How Big is Alaska," Alaska.org, <http://www.alaska.org/how-big-is-alaska/nebraska> (noting that Alaska is one-fifth the size of the contiguous U.S.) (last accessed July 25, 2019).

<sup>203</sup> Tucker Testimony, *Written Testimony*, p. 2.

8. The Division of Elections has no procedures in place to assess the effectiveness of poll worker training or outreach worker training.<sup>204</sup>
9. While the Division of Elections reported to the Committee that it had implemented most of the remedies in the Toyukak Order and even expanded the language panels to include the Inupiat panel,<sup>205</sup> testimony indicates that the Division of Elections still falls short on quality and usefulness of translations. For example, some voters indicated they had difficulty reading the Yup'ik ballot due to small font size.<sup>206</sup>
10. There is a statutory inconsistency regarding the rights of voters to receive the OEP in that one statute requires that it is sent to each household and another statute states that it should be sent to each voter. A Koliganek voter official reported that she never received an OEP in advance of the general election and state elections<sup>207</sup> but according to Alaska Statute 15.58.010, the Division of Elections must mail “at least one election pamphlet to each *household* identified from the official registration list.”<sup>208</sup> However, Alaska Statute 15.58.080 requires that the Division of Elections must mail to every registered *voter* one copy of the pamphlet prepared for the region in which the voter resides at least 22 days before the general election.<sup>209</sup>
11. There is an unequal distribution of election equipment among urban and rural polling stations. Some panelists expressed concern that equipment lacked privacy and was inadequate to serve rural voters.<sup>210</sup>
12. Although the *Nick, et al. v. Bethel, et al* case alleged the State of Alaska had been out of compliance with the VRA since the language assistance provisions were passed in 1975, testimony by Alaska Federation of Natives<sup>211</sup> and individuals<sup>212</sup> indicated that Governor Walker’s Administration was making efforts to comply.

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<sup>204</sup> Arriaga Testimony, *Anchorage Briefing*, p. 56.

<sup>205</sup> *Ibid.*, pp. 42-53.

<sup>206</sup> Merlino, Testimony, *Anchorage Briefing*, p. 119 (noting that requiring a specific font size in the translated ballots was not mandated by the Toyukak Order).

<sup>207</sup> Mulipola Testimony, *Written Testimony*, p. 2.

<sup>208</sup> Alaska Stat. § 15.58.010 (2014).

<sup>209</sup> Alaska Stat. § 15.58.080 (2000).

<sup>210</sup> Mulipola Testimony, *Written Testimony*, p. 2; *see also* Appendix H.

<sup>211</sup> Borromeo Testimony, *Anchorage Briefing*, p. 90.

<sup>212</sup> Hayton Testimony, *Anchorage Briefing*, p. 130.

### Findings concerning the potential impact of implementing a vote by mail system:

1. Voters expressed grave concern over the State's interest in implementing a vote by mail system due to slow mail delivery that often takes up to 2-3 weeks.<sup>213</sup> Mail delivery relies on air service but, according to testimony, villages may be inaccessible by air for several weeks due to inclement weather, and at times flights may be cancelled even in good weather conditions. To compound the issue further, the Regional Educational Attendance Areas elections and statewide general elections are held in October and November, when weather conditions are usually the most challenging, and delays in mail service are likely to disenfranchise rural voters.<sup>214</sup>
2. There has been no study examining the impact of vote by mail on Alaska Natives, limited English proficient voters, geographically and linguistically isolated communities, and voters who receive mail exclusively by P.O. Box.<sup>215</sup>
3. However, there is a related study focused on the impact of vote by mail on Native American voters in Washington, a state that administers elections exclusively by mail and voter turnout. Research indicated there is no evidence that vote by mail had any significant effect on increasing voting turnout among Native Americans.<sup>216</sup> In a related study commissioned by the State's Election Policy Work Group, rural voters who were dissatisfied or very dissatisfied with their mail service preferred to keep voting the way it is now when asked about their assessment of their mail service and preferred method to vote.<sup>217</sup>
4. A recent study conducted on reservations in Arizona, New Mexico, Nevada and South Dakota indicated that native voters have a low level of trust in a vote by mail system.<sup>218</sup> For example, 39 percent of Nevada residents in Duck Valley, Yerington, Pyramid Lake, and Walker River reservations trusted that their vote would count as intended.<sup>219</sup>
5. At a recent hearing in North Dakota, a tribal member who is also a current member of the Montana House of Representatives testified that offering only a vote by mail system

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<sup>213</sup> Mulipola Testimony, *Written Testimony*, p. 1.

<sup>214</sup> Tucker Testimony, *Written Testimony*, p. 7.

<sup>215</sup> Rich Testimony, *Anchorage Briefing*, pp. 89, 170-74.

<sup>216</sup> Dietrich Testimony, *Web Hearing I*, p. 10.

<sup>217</sup> *Perceptions of Universal Ballot Delivery Systems*, pp. 15-16.

<sup>218</sup> Rich Testimony, *Anchorage Briefing*, pp. 83-84; see also Jean Schroedel, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota*, Native American Voting Rights Coalition (2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>.

<sup>219</sup> Dietrich Testimony, *Web Hearing I*, p. 8.

disenfranchises voters in native communities because they have irregular mail and inconsistent or nontraditional addresses.<sup>220</sup>

6. Some rural Alaska Native villages have unreliable internet service or may even lack access to broadband internet<sup>221</sup> that may be necessary to meaningfully participate in the election process. Internet access would allow voters to access the Division of Election's website to download election forms and the OEP.<sup>222</sup> According to testimony, an Alaska Native elder walked two miles from her home to the nearest public library that had internet access to download the necessary election forms to participate in early voting.<sup>223</sup>
7. Testimony indicated the following concerns with implementing a vote by mail system:
  - a. There are challenges with employing and retaining postmasters residing in rural parts of the state.<sup>224</sup> This poses a concern as voters rely heavily on postmasters to keep post offices open to receive mail and obtain mail services.
  - b. Since rural residents often share P.O. boxes, sometimes multiple families sharing one P.O. box,<sup>225</sup> voters may not be receiving all election-related material. This is critical to ensuring privacy and enfranchisement.
  - c. Researchers argue that a vote by mail system causes five issues:
    - i. distance to post offices or mailboxes is an impediment to casting ballots;
    - ii. it does nothing to counter the lack of trust in the veracity of government institutions, especially among Native American communities;
    - iii. it fails to tangibly link citizens to the democratic process;
    - iv. it has little impact in broadly increasing participation among Native American voters;
    - v. and there are no systems in place to address lost ballots.<sup>226</sup>
8. Nearly half of rural voters from the Bethel, Dillingham, and Kusilvak Census Areas prefer to keep the current voting method the same and the second preference is to receive their ballot in the mail and have different ways to return it.<sup>227</sup>

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<sup>220</sup> Tucker Testimony, *Written Testimony*, p. 7.

<sup>221</sup> Hayton Testimony, *Anchorage Briefing*, p. 88; Tucker, *Written Testimony*, pp. 1-2; Merlino Testimony, *Anchorage Briefing*, pp. 119-20.

<sup>222</sup> Merlino Testimony, *Anchorage Briefing*, pp. 120-21.

<sup>223</sup> Borromeo Testimony, *Anchorage Briefing*, p. 88.

<sup>224</sup> Haberman Testimony, *Anchorage Briefing*, p. 213.

<sup>225</sup> Medicine-Crow Testimony, *Anchorage Briefing*, p. 210.

<sup>226</sup> Dietrich Testimony, *Web Hearing I*, p. 10.

<sup>227</sup> Hanna Testimony, *Web Hearing II*, p. 3.

9. The settlement agreement mandates that language assistance be provided prior to and during the voting process. It was not clear, if language assistance could or would be provided prior to and during the possible implementation of a vote by mail system.
10. At the time of the August 24, 2017 public briefing in Anchorage, the Division of Elections testified that adopting a hybrid model that consists of a vote by mail and in person voting system was seen more favorably rather than implementing a vote by mail system exclusively.<sup>228</sup> However, they have since indicated that due to the challenges that geography would pose for mail service, implementing an all vote by mail system is not an option for Alaska.<sup>229</sup> Testimony indicated that the application of a hybrid model may only work if the Division of Elections established a voting center in each of the over 200 Alaska Native villages and required that each of them be open for the same period as other early voting locations.<sup>230</sup>
11. Panelists noted that when considering a vote by mail system, the State is still required to abide by the terms of the Toyukak Order. Those terms require significant in-person assistance and therefore vote by mail can only potentially work if there was a “voting center” in each village covered by Section 203 of the VRA.<sup>231</sup>
12. According to a vote by mail expert, developing a remedy process and signature verification system is a necessary component when considering a vote by mail system.<sup>232</sup>
13. Panelists suggested strong and ongoing collaboration among the Alaska Native communities, rural communities,<sup>233</sup> state election officials, and the U.S. Postal Service<sup>234</sup> to deter voter disenfranchisement especially among Alaska Native voters in need of language assistance.
14. According to the U.S. Postal Service, when inclement weather impacts delivery to rural areas, passengers and luggage are the priority, not mail. This means that election-related mail is considered secondary in importance.<sup>235</sup>

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<sup>228</sup> Bahnke Testimony, *Anchorage Briefing*, p. 151.

<sup>229</sup> Josie Bahnke, Recap of EPWG email, Thursday, July 26, 2018; *See* Appendix D.

<sup>230</sup> Tucker Testimony, *Written Testimony*, p. 1.

<sup>231</sup> Tucker Testimony, *Anchorage Briefing*, pp. 7-8.

<sup>232</sup> Gronke Testimony, *Anchorage Briefing*, p. 196.

<sup>233</sup> Patrick Testimony, *Anchorage Briefing*, pp. 159-60.

<sup>234</sup> Gronke Testimony, *Anchorage Briefing*, p. 179; Patrick Testimony, *Anchorage Briefing*, p. 162.

<sup>235</sup> Haberman Testimony, *Anchorage Briefing*, pp. 189-90.

15. Because the U.S. Postal Service transfers mail from villages to the Anchorage central hub, where it is postmarked,<sup>236</sup> rural residents who vote in a village may not have their ballots counted due to the possibility of late postmarking.
16. Testimony indicated that U.S. Postal Service training on handling election-related material is inadequate due to the high number of U.S. Postal Service employees who need to be trained.<sup>237</sup>
17. Presently, state election officials have not yet determined how to directly distribute ballots and the translated OEPs to Section 203-covered households<sup>238</sup> due to limited data sources that indicate languages spoken at home. Efforts to circulate the OEP were done through respective regional tribes, local governments, online, the Alaska Federation of Natives' conference, and other advocacy organizations prior to the 2016 presidential election and will continue to be circulated in this fashion.<sup>239</sup>
18. Testimony indicated the following potential impacts of implementing a vote by mail system:
  - a. It may have the potential for improving voter registration rolls.<sup>240</sup>
  - b. It has increased voter turnout in state and local elections among certain populations in other states.<sup>241</sup> However, factors such as socioeconomic status, demographics, educational attainment and the issues on the ballot are primary determinants of voter turnout.<sup>242</sup>
  - c. It creates the potential for logistical and administrative problems and even increased potential for malfeasance.<sup>243</sup>
19. A study conducted asking English-speaking rural voters, most of whom are Alaska Native, how they prefer to receive their ballots. Roughly 60 percent replied they prefer to

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<sup>236</sup> Ibid., p. 190.

<sup>237</sup> Ibid., pp. 186-87.

<sup>238</sup> Bahnke Testimony, *Anchorage Briefing*, pp. 202-03.

<sup>239</sup> Arriaga Testimony, *Anchorage Briefing*, pp. 47-48.

<sup>240</sup> Gronke Testimony, *Anchorage Briefing*, p. 179.

<sup>241</sup> Paul Gronke, Thad Kousser & Megan Mullin, *Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment*, 15(4) *POLIT. ANAL.* 428-45 (2007), <http://www.jstor.org/stable/25791905>; Justin Burchet & Priscilla Southwell, *The Effect of All-mail Elections on Voter Turnout*, 28(1) *AM. POLIT. RES.* 72-79 (2000), <https://doi.org/10.1177/1532673X00028001004>; Alan S. Gerber, Gregory A. Huber & Seth J. Hill, *Identifying the Effect of All-Mail Elections on Turnout: Staggered Reform in the Evergreen State*, 1 *PRSM* 91-116 (2013).

<sup>242</sup> Dietrich Testimony, *Web Hearing I*, p. 3.

<sup>243</sup> Ibid., p. 4.

receive it in person on Election Day, 21 percent prefer to receive it by mail, and 17 percent prefer to receive it online.<sup>244</sup>

## **B. Recommendations**

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>245</sup> In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Alaska Advisory Committee submits the following recommendations to the Commission:

1. The U.S. Commission on Civil Rights should send this report and issue a formal request to the U.S. Department of Justice to:
  - a. Vigorously enforce Section 203 of the Voting Rights Act in Alaska.
  - b. Continue to send federal observers to monitor state elections even after the Toyukak Order expires, to ensure its implementation remains in place.
2. The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the U.S. Postal Service to:
  - a. Require specific training of all Alaska postal service employees to handle election material to ensure prompt delivery.
  - b. Ensure prompt postmarking of election mail, especially in rural areas of the state. This may include proactive recruitment of postmasters in rural post offices to ensure adequate support to rural residents.
  - c. Prioritize handling election mail as among other mail.
3. The U.S. Commission on Civil Rights should send this report and issue a recommendation to the Alaska Congressional Delegation to:
  - a. Provide appropriations from the Help America Vote Act to support language assistance efforts in Alaska.
4. The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the State of Alaska Legislature urging the State to:
  - a. Provide appropriations to ensure the Division of Elections has the funding to continue complying with Section 203 of the Voting Rights Act, the Toyukak Order, and Title VI of the Civil Rights Act.

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<sup>244</sup> *Perceptions of Universal Ballot Delivery Systems*, p. 5; see also *supra* methodology pp. 18-21.

<sup>245</sup> 45 C.F.R. § 703.2 (a).



- b. Improve broadband service in rural areas of the state, to ensure that voters have access to all online election material, including translated official election pamphlets provided by the Division of Elections.
  - c. Enact legislation resembling Title VI of the Civil Rights Act to help ensure statewide access to voting materials for voters with limited English proficiency.
- 5. The U.S. Commission on Civil Rights should send this report and issue the following recommendations to the Alaska Governor, Lieutenant Governor, and the State of Alaska Division of Elections:
  - a. Conduct and consider analyses on the vote by mail system and its potential impact on the following communities: (i) Alaska Natives, (ii) rural residents, (iii) linguistically isolated and limited English proficient residents, and (vi) the illiterate voting age population.
  - b. Pause plans to move forward with a vote by mail system in any census area covered by the *Toyukak v. Mallott* settlement agreement, unless the Division of Elections can ensure that all terms of the Toyukak Order will be fully complied with.
  - c. Comply with all terms and conditions in the Toyukak court order.
  - d. Continue providing language assistance in Gwich'in and Yup'ik because these languages continue to be covered by Section 203 despite the 2020 expiration of the Toyukak Order.
  - e. Implement a hybrid voting system that includes: a strong early voting option; in-person voting both in early/absentee voting and on Election Day; and a vote by mail system to avoid voter disenfranchisement.
  - f. Continue to convene community speaker-based language panels to strengthen language access efforts and consider identifying additional panel members from the University of Alaska Fairbanks, Alaska Native Language Center, if available.
  - g. Consider implementing recommendations and best practices from the President's Commission on Election Administration regarding access to the polls and polling place management.<sup>246</sup>
  - h. Review Title VI language access requirements to ensure compliance.

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<sup>246</sup> Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (Jan. 2014), <https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

- i. Evaluate the effectiveness of poll worker and outreach worker training to identify areas for improvement and implement those improvements.
- j. Specifically, given its limited efficacy, refrain from using telephone training except in exigent circumstances.
- k. Based upon testimony heard regarding the substantial undertaking to implement a state-wide language assistance program and the testimony indicating that problems and challenges remain, the State should extend the Toyukak Order past 2020.
- l. Given the lack of broadband access in most parts of rural Alaska,<sup>247</sup> require alternative methods for receiving election materials such as sending election material directly to voting centers and inform voters by broadcasting informational commercials on radio and television.
- m. Continue convening the Election Policy Work Group to analyze the impact of mail in voting.

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<sup>247</sup> Hayton Testimony, *Anchorage Briefing*, p. 88; Tucker Testimony, *Written Testimony*, pp. 1-2; Merlino Testimony, *Anchorage Briefing*, pp. 119-20.

## **VII. APPENDIX**

### **A. Timeline of Events Related to Study**

### **B. *Toyukak v. Mallott* Stipulated Judgement and Court Order**

### **C. Division of Elections Reports**

*I. Perceptions of Ballot Delivery Systems: Findings from A Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska*

*II. Bethel Focus Groups*

*III. Voting Methods Survey*

### **D. Verification of the Mailed Official Election Pamphlets Submitted by the Division of Elections**

### **E. Distribution List for Regional Educational Attendance Area Sample Ballots Submitted by the Division of Elections**

### **F. Email to Election Policy Work Group from Josie Bahnke**

### **G. Written Testimony:**

*I. Grace Mulipola, Bristol Bay Native Corporation*

*II. Elizabeth Steele, Colorado Common Cause*

*III. Dr. James Tucker, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*

*IV. Josie Bahnke, State of Alaska Division of Elections*

### **H. Photos of Rural Voting and Urban Voting Experiences**

### **I. Federal Register Notice for Voting Rights Act Amendments of 2006, Determinations Under Section 203**

### **J. August 24, 2017 Briefing Agenda & Minutes**

### **K. August 24, 2017 Briefing Transcript**

### **L. June 19, 2018 Web Hearing Transcript, Testimony by Dr. Joseph Dietrich from Claremont Graduate University**

### **M. August 1, 2018 Web Hearing Transcript, Testimony by Virgene Hanna from the University of Alaska Anchorage, Institute of Social and Economic Research**

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## **Appendix A**

### **Timeline of Events Related to Study**

Nov. 2010 – 2014	Lieutenant Governor Mead Treadwell in office
Jul. 2013	Mike Toyukak, Fred Augustine and four Alaska Native tribal governments sue the Lieutenant Governor of the State of Alaska, and the Division of Elections, for failing to provide effective language assistance to limited English proficient Alaska Native voters
Nov. 2014 – Dec. 2018	Lieutenant Governor Byron Mallott in office
Sept. 2014	Court decision on <i>Toyukak v. Mallot</i>
2015	Division of Elections convenes Election Policy Work Group
Sep. 2015 <sup>248</sup>	In <i>Toyukak v. Mallot</i> , both parties reached settlement agreement to remedies set forth by court
Sep. 2015 <sup>249</sup>	Implementation of remedies detailed in <i>Toyukak v. Mallott</i> settlement agreement effective
May 2017	Division of Elections releases report <i>Division of Elections 2017 Fiscal &amp; Policy Challenges</i>
Aug. 2017	Alaska Advisory Committee conducts briefing on Alaska Native Voting Rights in Anchorage
Nov. 2017	Division of Elections releases results from <i>Voting Methods Survey</i>
May 2018	Division of Elections releases results from <i>Bethel Focus Groups</i>
Jun. 2018	Division of Elections releases study on <i>Perceptions of Ballot Delivery Systems: Findings from a Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska</i>
Jun. 2018	Alaska Advisory Committee receives testimony from Dr. Joseph Dietrich at Claremont Graduate University on <i>An Evaluation of Academic Research on Vote by Mail and the Impact for Native American Communities</i>

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<sup>248</sup> September 8, 2015.

<sup>249</sup> September 30, 2015.

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Oct. 2018 – Dec. 2018	Lieutenant Governor Valerie Davidson in office
Dec. 2018 – Present	Lieutenant Governor Kevin Meyer in office
Aug. 2018	Alaska Advisory Committee receives testimony from Virgene Hanna at the University of Alaska Anchorage on <i>Perceptions of Ballot Delivery Systems: Findings from a Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska</i>
Dec. 2020 <sup>250</sup>	Remedies detailed in <i>Toyukak v. Mallott</i> settlement agreement expire, however the expiration date may be modified by court or parties.

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<sup>250</sup> December 31, 2020.

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## **Appendix B**

### ***Toyukak v. Mallott Stipulated Judgement and Court Order***

<http://bit.ly/AK-voting>

## **Appendix C**

### **Division of Elections Reports**

Reports are attached to a letter written by the Division of Elections to the Election Policy Work Group here: <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=113377>

- I. Perceptions of Ballot Delivery Systems: Findings from A Survey with Registered Voters in Three Areas in Rural (Region IV) Alaska
- II. Bethel Focus Groups
- III. Voting Methods Survey

## **Appendix D**

### **Verification of the Mailed Official Election Pamphlets Submitted by the Division of Elections**

<https://www.facatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000000rGwuAAE>

## **Appendix E**

### **Distribution List for Regional Educational Attendance Area Sample Ballots Submitted by the Division of Elections**

<https://www.facatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000000rGwuAAE>

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## **Appendix F**

### **Email to Election Policy Work Group from Josie Bahnke, Director of the Division of Elections on July 28, 2018**

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**From:** Bahnke, Josephine H (GOV) <josie.bahnke@alaska.gov>  
**Sent:** Thursday, July 26, 2018 11:33 AM  
**Subject:** Recap of EPWG Meeting

Dear Election Policy Work Group Members,

Thank you for your participation in yesterday's teleconference! For those that couldn't attend, we missed you. At the meeting, we presented **research** information (ISER, Bethel Focus Groups, AML Survey) that reflects the voice of Alaskan voters, provided an update on the status of new **voting technology** and **funding** since your May meeting in Anchorage. Nineteen EPWG members were present, including Former Lt. Governor Fran Ulmer. We also had media and legislative staff call-in for the meeting. Overall, I think it was well attended, organized, informative and as a result, the meeting is receiving positive coverage in the news cycle:

<http://juneauempire.com/news/state/2018-07-26/prepping-2018-election-state-looks-2020>  
<http://www.ktuu.com/content/news/Alaska-voting-will-change-in-2020-officials-trying-to-determine-how-different-it-will-be-489183051.html>  
<https://www.ktoo.org/2018/07/25/state-officials-weigh-shift-to-more-voting-by-mail/>  
<http://midnightsunak.com/2018/07/25/paper-ballots-are-here-to-stay-as-election-officials-plan-upgrade-and-expansion-of-alaskas-voting-system/>

In a nutshell, the **research** informed the group that an exclusive all vote by mail (VBM) system is **not** an option for Alaska. This is primarily due to unique challenges of rural mail service, NVRA requirements to provide language assistance, and a desire for communities to retain the social aspect of going to the polls on Election Day. However, Alaskans support expanding voter options for ballot access to increase voter participation and the concept of a universal (hybrid) ballot delivery system.

Based on the **Technology** Fair with election hardware/software vendors held in May, we learned how much technology has improved and solutions exist to create efficiencies, expand language assistance, progress with disabled voters, and the options to purchase/lease can be adaptable to any future system changes adopted by the State of Alaska.

In recognition of the FY 2019 Capital Budget which includes **\$4.8M in funding** to modernize and replace the existing election voting equipment, we discussed progress moving forward with the purchase/lease of a new system to be in place for the 2020 election. In light of the need to keep momentum going and allow the Division to shift focus to the

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2018 election cycle, we brought on Dennis Wheeler as Project Manager (effective July 1) to help us navigate next steps with AK's voting system replacement and expanding voter choice for access to the ballot.

We are viewing the high-level project in two categories:

1. Voting equipment replacement: Help DOE vet, acquire, and implement the required IT systems & guide the overall project with our internal management team of four. Assist with RFP and vendor selection process. Since this is an election management task, we are moving forward with a project timeline. I'll keep you apprised as we progress.
2. Expanding voter choice: Create base documentation for state law changes, assist with EPWG Planning Committee (Bruce, Randy, Joelle, Johni, Marna volunteered at May meeting) legislative strategy, and stakeholder outreach. A more formal recommendation on the issue of expanding voter choice and access to the ballot will be presented to the EPWG for consideration in late 2018, after we've been able to conduct a full organizational and cost analysis of a Universal (Hybrid) Ballot Delivery system for future state elections. The idea is to have legislation pre-filed or introduced this next legislative session. An extensive stakeholder/community outreach led by the EPWG on the issue will follow.

Aside from some internal planning meetings with EPWG members, this will be the last foreseeable formal meeting until after the general election. However, we will continue to keep you in the loop on progress and to share information. Big thanks to Liz MC for doing an outstanding job chairing the meeting!!

Yours truly,  
JHB

**Josie Bahnke | DIRECTOR**

DIVISION OF ELECTIONS  
240 Main Street Suite 400  
Juneau, AK 99811-0017  
[josie.bahnke@alaska.gov](mailto:josie.bahnke@alaska.gov) | [elections.alaska.gov](http://elections.alaska.gov)

907.500.4556 MOBILE



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## **Appendix G**

### **Written Testimony**

<https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000000DT4TAAW>

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## Appendix H

### Urban Voting vs. Rural Voting



Voting in the City



Voting in rural Alaska

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## **Appendix I**

[Federal Register Notice for Voting Rights Act Amendments of 2006, Determinations Under Section 203](#)

## **Appendix J**

### **Briefing Agenda and Minutes**

<https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000000DT4TAAW>

## **Appendix K**

### **Briefing Transcript**

[https://gsa-geo.my.salesforce.com/sfc/p/#t00000000Gyj0/a/t000000005oAp/JeEJVBDfrlc2eeWt\\_drdzORPLr4XxzNw777boxfIHZQ](https://gsa-geo.my.salesforce.com/sfc/p/#t00000000Gyj0/a/t000000005oAp/JeEJVBDfrlc2eeWt_drdzORPLr4XxzNw777boxfIHZQ)

## **Appendix L**

### **June 19, 2018 Web Hearing Transcript, Testimony by Dr. Joseph Dietrich from Claremont Graduate University**

[https://gsa-geo.my.salesforce.com/sfc/p/#t00000000Gyj0/a/t000000005oOJ/PuL5b.gc8z\\_V9eM6Q\\_T4pLeY4.uF0EmHs3O5a9HluBs](https://gsa-geo.my.salesforce.com/sfc/p/#t00000000Gyj0/a/t000000005oOJ/PuL5b.gc8z_V9eM6Q_T4pLeY4.uF0EmHs3O5a9HluBs)

## **Appendix M**

### **August 1, 2018 Web Hearing Transcript, Testimony by Virgene Hanna from the University of Alaska Anchorage, Institute of Social and Economic Research**

<https://gsa-geo.my.salesforce.com/sfc/p/#t00000000Gyj0/a/t000000005vUm/QqB1TYFMxBx92u9Ep9g8fmmFWwRIMsxQdwtQOqArAgo>

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**Alaska Advisory Committee to the  
United States Commission on Civil Rights**



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**U.S. Commission on Civil Rights Contact**

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USCCR Contact	Regional Programs Coordination Unit U.S. Commission on Civil Rights 300 N. Los Angeles Street, Suite 2010 Los Angeles, CA 90012 (213) 894-3437
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This report is the work of the Alaska Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government. For more information or to obtain a print copy of this report, please contact the Regional Programs Coordination Unit.